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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

No.

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY,
PETITIONER

v.

ANNA RUE CAMP AND JOHN E. VENN,
as Trustee of the Estate of
Fariss D. Kimbell, Jr., M.D.,
RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Does property of a Bankruptcy Estate under 11 U.S.C. §541(a) include a bad faith cause of action for failure of the named insured's insurance carrier to settle a claim against the named insured where the alleged conduct of the insurance carrier and the trial of the underlying claim occurred after the filing of the named insured's Chapter 7 case under Title 11?

2. Does a Bankruptcy Estate in a Chapter 7 Case under Title 11 become the 'insured' by operation of law under a Debtor-physician's malpractice insurance policy upon the filing of the Debtor's Chapter 7 petition?

3. May a Bankruptcy Estate created pursuant to 11 U.S.C. § 541(a) be harmed by an increase in the amount of proofs of claims filed against it pursuant to 11 U.S.C. § 501?

4. Did the court of appeals improperly allow the erroneous views and conclusions of the Supreme Court of Florida on federal bankruptcy law to become the law of the case in the case at bar?

PARTIES TO THE PROCEEDING IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioner and Respondents were the sole parties in the proceedings before the United States Court of Appeals for the Eleventh Circuit.[1]

[1] Pursuant to Sup.Ct.R 29.1, Petitioner shows that its sole parent company is The St. Paul Companies, Inc. and that all of its subsidiaries are wholly owned.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

St. Paul Fire and Marine Insurance Company respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The United States District Court for the Northern District of Florida in a diversity of citizenship case rendered a decision on cross motions for summary judgment filed by Petitioner and Respondents granting Petitioner's motion for summary judgment and denying the motion filed by Respondents. It also dismissed Respondent, Anna Rue Camp, as a party Plaintiff. This decision, App., infra., 1a-15a, is reported as *Anna Rue Camp, et al., v. St. Paul Fire and Marine Insurance Company*, 127 B.R. 879 (N.D.Fla. 1991).

Respondents appealed to the United States Court of Appeals for the Eleventh Circuit. The court of appeals, App., *infra*, 16a-24a,

certified two questions to the Supreme Court of Florida. This decision is reported as *Anna Rue Camp and John E. Venn, as Trustee of the Estate of Fariss D. Kimbell, Jr., M.D. v. St. Paul Fire and Marine Insurance Company*, 958 F.2d 340 (11th Cir.1992). The opinion of the Supreme Court of Florida, App., *infra*, 25a-30a, purporting to answer the two certified questions is reported as *Anna Rue Camp, et al, v. St. Paul Fire & Marine Insurance Company*, 616 So.2d 12 (1993). The second opinion of the court of appeals, App, *infra*, 31a-32a, reversing the district court's grant of summary judgment to Petitioner, but affirming the dismissal of Anna Rue Camp as a Plaintiff in the case, is reported as *Anna Rue Camp and John E. Venn, as Trustee of the Estate of Fariss D. Kimbell, Jr., M.D. v. St. Paul Fire and Marine Insurance Company*, 989 F.2d 428 (11th Cir.1993). Petitioner's Suggestion of Rehearing en Banc was denied, App., *infra*, 33a-34a.

STATEMENT OF GROUNDS ON WHICH JURISDICTION OF THIS COURT IS INVOKED

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on April 22, 1993. A Suggestion of Rehearing in Banc was denied on June 18, 1993.[2] App., *infra*, 33a-34a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED IN THIS CASE

11 U.S.C. § 330(b); 11 U.S.C. § 362; 11 U.S.C. § 541; 11 U.S.C. § 541(a); 11 U.S.C. § 541(a)(1); 11 U.S.C. § 541(a)(5); 11 U.S.C. § 727; Section 55.145, *Florida Statutes;* and Rule 9019, *Federal Rules of Bankruptcy Procedure* are reprinted in pertinent part in App., *infra*, 35a-37a.

STATEMENT OF THE CASE

The following facts are derived from the summary judgment record before the district court.

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[2] Pursuant to 11 Cir. R.35-6, a "Suggestion of Rehearing En Banc" is treated by the United States Court of Appeals for the Eleventh Circuit as a petition for rehearing. Therefore, the time for petitioning this Court under Sup.Ct.R 13.1 for a writ of certiorari runs from the date of the denial of the "Suggestion of Rehearing En Banc" and would expire at close of business on September 16, 1993.

During 1983, Dr. Fariss Kimbell ("Dr. Kimbell"), a Pensacola, Florida neuro-surgeon, performed several surgical procedures on Anna Rue Camp ("Mrs. Camp"). On December 10, 1984, Mrs. Camp and her husband[3] instituted suit in a Florida state court (the "Malpractice Suit") against Dr. Kimbell alleging that Dr. Kimbell provided Mrs. Camp with negligent medical care.

Dr. Kimbell maintained a $250,000.00 medical malpractice insurance policy with Petitioner, and in accordance with such policy, Petitioner undertook to provide legal counsel for Dr. Kimbell and to defend him in the Malpractice Suit.

On July 11, 1986, prior to the trial of the Malpractice Suit and because of serious financial difficulties unrela' d to the Malpractice Suit[4], Dr. Kimbell filed a voluntary Chapter 7 bankruptcy petition under Title 11, United States Code. Litigation of the Malpractice Suit was stayed by operation of the automatic stay of Section 362 of the Bankruptcy Code. On November 24, 1986, Dr. Kimbell received a complete discharge of his debts under Section 727 of the Bankruptcy Code. On March 12, 1987, Mr. and Mrs. Camp filed a motion in Dr. Kimbell's bankruptcy case seeking relief from the automatic stay in order to continue the Malpractice Suit.

On April 13, 1987, the Bankruptcy Court granted the Camps' motion and modified the automatic stay thereby authorizing the Malpractice Suit to continue. The Bankruptcy Judge expressly ordered that any judgment entered in the Malpractice Suit against Dr. Kimbell would be for the sole purpose of liquidating the Camps' claim in the Chapter 7 case and would not be enforceable against Dr. Kimbell as a personal liability.

On May 29, 1987, trial of the Malpractice Suit commenced in the Florida Circuit Court. It is undisputed that both prior to and after Dr. Kimbell's bankruptcy petition was filed and up until the beginning of the trial of the Malpractice Suit, Mr. and Mrs. Camp through their attorneys had offered to settle the Malpractice Suit for

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[3] The record shows that Mrs. Camp's husband, Harvey D. Camp, although a plaintiff in the state court suit and a co-movant with Mrs. Camp in obtaining relief from the automatic stay in the Bankruptcy Court (discussed, *infra*) has never been a party litigant in the case at bar.

[4] The District Court held that Petitioner's conduct in refusing to settle the Malpractice Suit for the policy limits (see discussion, *infra*) was not the cause of Dr. Kimbell's bankruptcy. App., *infra*, 12a-15a.

the $250,000.00 limits of Dr. Kimbell's policy. It is also undisputed that Petitioner, on advice of its counsel, declined to settle for the policy limits.

On June 25, 1987, a verdict was reached by the jury in the Malpractice Suit. This verdict and judgment was in excess of the $250,000.00 policy limits payable by Petitioner under Dr. Kimbell's malpractice insurance policy. Thereafter, Petitioner paid the limits of Dr. Kimbell's insurance policy into the registry of the state court, and the state court, pursuant to Florida law,[5] entered an Order canceling and discharging the Camp judgment against Dr. Kimbell.

On December 30, 1988, Respondents[6] instituted a suit in the Florida state Circuit Court against Petitioner asserting that Petitioner had acted in bad faith for refusing to settle Mrs. Camp's medical malpractice claim against Petitioner's insured, Dr. Kimbell. Petitioner timely removed the bad faith action to the United States District Court for the Northern District of Florida on February 6, 1989.[7]

Following conclusion of discovery, both Petitioner and Respondents moved for summary judgment. Petitioner argued in its motion that harm to the insured is a prerequisite to maintaining a bad faith action under Florida law.[8] Since Dr. Kimbell was never personally liable for the Camp judgment,[9] he was never harmed by any conduct of Petitioner.

The district court granted Petitioner's motion for summary judgment and denied Respondents' motion. In so doing, the district court, citing *Cope* and *Clement v. Prudential Property & Casualty Co.*,

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[5] Section 55.145, *Fla. Stat.*

[6] Mrs. Camp was joined by John E. Venn, Dr. Kimbell's Trustee in Bankruptcy, as Plaintiffs in the District Court suit.

[7] The District Court has jurisdiction over this case as a diversity case under 28 U.S.C. § 1332.

[8] Prior to the commencement of the case at bar, Florida law required harm to the insured as a prerequisite to recovery in a bad faith action. *See Fidelity & Casualty Company of New York v. Cope*, 462 So.2d 459 (Fla.1985).

[9] The District Court in its opinion granting summary judgment in favor of Petitioner found no evidence to support a finding that St. Paul's refusal to settle contributed in any way to Dr. Kimbell's financial difficulties.

790 F.2d 1545 (11th Cir.1986), reasoned that under Florida law, a bad faith claim against an insurance company cannot arise if the insured is released or receives a discharge of his liability to the injured party. Since Dr. Kimbell had received a bankruptcy discharge of his liability to Mr. and Mrs. Camp *prior* to the entry of judgment against him in the Malpractice Suit, he was not and could not be harmed by Petitioner's actions. The district court concluded that no bad faith claim against Petitioner existed.[10]

The district court also dismissed Mrs. Camp as a party plaintiff.[11]

Respondents appealed the district court's grant of summary judgment to the United States Court of Appeals for the Eleventh Circuit. On April 16, 1992, the court of appeals certified the following two questions to the Supreme Court of Florida:

> (I) Whether, as a matter of law, a named insured's bankruptcy and discharge from liability prior to exposure to an excess Judgment, such that the named insured was never personally liable for any amount of the Judgment, precludes an injured party's or bankruptcy trustee's subsequent bad faith cause of action against an insurance company.
>
> (2) Whether, as a matter of law, the language of a bankruptcy clause in a particular insurance policy, such as the language at issue in this case, can authorize an injured party's or bankruptcy trustee's bad faith action against an insurance company, notwithstanding the fact that the named insured was never personally liable for any

[10] The District Court also held that the insurer's duty of good faith runs to the insured alone and that the Bankruptcy Estate's cause of action is entirely derivative of the insured and is extinguished once the insured is discharged. App., *infra*, 8a.

[11] Dismissal of Mrs. Camp was affirmed by the Court of Appeals. App., *infra*, 32a.

> amount of excess Judgment due to the named insured's bankruptcy.

App., *infra*, 23a. On February 4, 1993, the Supreme Court of Florida purported to answer the two certified questions propounded by the court of appeals.

The Supreme Court of Florida did not directly answer the first certified question. Instead, while appearing to reaffirm its holding in *Cope*[12] respecting the requirement of "harm" to an insured, it held that a bad faith cause of action would lie if there was "harm" to the insured's Bankruptcy Estate. It then determined that Dr. Kimbell's Bankruptcy Estate was harmed by the increase in debt of the Estate to the detriment of its creditors. App., *infra*, 30a.

Regarding the Court of Appeal's second certified question, the issue presented to the Supreme Court of Florida was whether the particular language in Dr. Kimbell's insurance policy would expand the insurance company's liability for bad faith where the named insured was never personally liable for the excess judgment. Again, the Supreme Court of Florida did not directly answer the question. After reviewing Section 541(a)(1) of the Bankruptcy Code, it held:

> Thus, in the instant case, the Bankruptcy Estate holds Dr. Kimbell's insurance policy as an asset because it was an interest of the debtor when the bankruptcy suit was filed in July 1986. The Bankruptcy Estate stood in the shoes of the debtor and, in effect, the estate became the insured.

App., *infra*, 29a. The Supreme Court of Florida then concluded that Petitioner assumed a duty to Dr. Kimbell's Bankruptcy Estate and breached that duty thereby giving rise to the cause of action by the Trustee.

In a brief second opinion, the court of appeals noted that the Supreme Court of Florida had held that a bankruptcy trustee could bring an action against the Debtor's insurance company for a bad faith failure to settle a claim. It thereupon reversed the district court, holding that the district court's prior ruling granting Petitioner's

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[12] *See* note 6, *supra*.

motion for summary judgment was contrary to the holding of the Supreme Court of Florida. App., *infra*, 32a.

The court of appeals went on to note that the Supreme Court of Florida had also held that Dr. Kimbell's Bankruptcy Estate "stood in the shoes of the debtor and, in effect, the estate became the insured". The court of appeals then reasoned that Petitioner's duty to act in good faith thus only ran to the Bankruptcy Estate.[13] App., *infra*, 32a.

REASONS FOR GRANTING THE WRIT

The case at bar presents the following substantial issues of administration of the federal Bankruptcy Code[14]: Whether an alleged chose in action which arises *after* the filing of a Chapter 7 bankruptcy petition can become an asset of a Bankruptcy Estate notwithstanding the plain meaning of Section 541(a)(1) of the Bankruptcy Code; a question of first impression as to whether a Bankruptcy Estate can become the 'insured' under a Debtor's pre-bankruptcy liability insurance policy; and, another question of first impression as to whether a Bankruptcy Estate under federal law can be 'harmed' and suffer damages by conduct which allegedly increases the amount of creditor claims.

The case at bar also presents important issues regarding the proper use by a court of appeals of a state supreme court's responses to certified questions of state law where such responses rely upon an erroneous understanding of federal bankruptcy law.

As discussed *infra*, there are no federal cases supporting the holdings of the court of appeals. Petitioner submits that the Eleventh Circuit's decision is so clearly wrong that the Court may wish to consider summary reversal.

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[13] The Court of Appeals then held that Mrs. Camp could not maintain an action against Petitioner for bad faith, apparently because Petitioner's duty did not run to her, but only to the Bankruptcy Estate.

[14] 11 U.S.C. 101, *et seq.*

The bad faith claim[15] is not property of the Bankruptcy Estate.

For the first time in a reported case, a federal court has ruled that under Section 541 of the Bankruptcy Code a Chapter 7 Bankruptcy Estate is the owner of a cause of action which arises *after*[16] the filing of the Chapter 7 Petition. The Eleventh Circuit's decision is inconsistent with numerous decisions of federal courts which hold that a Bankruptcy Estate's interest in property is derivative of the Debtor's rights and interest as of the date of the filing of the Petition.[17] As pointed out by 4 *Collier on Bankruptcy* ¶ 541.01 at p.541-6:

> Although the broad provision of section 541(a)(1) includes choses in action and claims by the debtor against others, *it is not intended to expand the debtor's rights against others beyond what rights existed at the commencement of the case.* For example, if a debtor's claim is barred by the statute of limitations at the commencement of the case, the trustee too will be barred and cannot, therefore, pursue

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[15] In the courts below, Petitioner has steadfastly denied that it acted in bad faith. In fact, the district judge noted in his opinion that "...there are many genuine issues of material fact concerning the underlying bad faith claim...." App., *infra* at 3a-4a.

[16] Other than as expressly provided in Section 541(a)(5) of the Bankruptcy Code.

[17] Section 541(a)(1) of the Bankruptcy Code provides that property of the estate includes "...all legal or equitable interests of the debtor in property *as of the commencement of the case.*" (Emphasis supplied). Bankruptcy Estate succeeds only to those interests that debtor had in property prior to commencement of bankruptcy case. *In re FCX, Inc.*, 853 F.2d 1149,1153 (4th Cir.1988), *cert. denied Universal Cooperatives, Inc. v. FCX, Inc.*, 489 U.S. 1011, 109 S.Ct. 1118, 103 L.Ed.2d 181 (1989). "The bankruptcy estate consists of 'all legal or equitable interests of the debtor in property as of the commencement of the case.'" *In re Schneider*, 864 F.2d 683,685 (10th Cir.1988). A trustee in bankruptcy succeeds to all causes of action held by the debtor at the time the bankruptcy petition is filed. *Jones v. Harrell*, 858 F.2d 667,669 (11th Cir.1988). The Eleventh Circuit's decision is even inconsistent with its own holding in *Romano v. American Casualty*, 834 F.2d 968 (11th Cir.1987).

> the claim. *The Trustee can take no greater rights than the debtor himself had on the date the case was commenced.* (Emphasis supplied.)

It is settled Florida law that a cause of action based on the bad faith of an insurance carrier does not arise until the insured is legally obligated to pay the excess judgment. *Blanchard v. State Farm*, 575 So.2d 1289 (Fla.1991); *State Farm v. Marshall*, 618 So.2d 1377 (Fla. 5th DCA 1993); *Kelly v. Williams*, 411 So.2d 902 (Fla. 5th DCA), *rev. denied*, 419 So.2d 1198 (Fla.1982) (Citing *Farmers Insurance Exchange v. Henderson*, 82 Ariz. 335, 313 P.2d 404 (1957) and 7C *J. Appleman, Insurance Law and Practice*, § 4712 [Berdal ed. 1979]).[18] On the date the bankruptcy petition was filed, Dr. Kimbell was the insured under the subject malpractice policy, and he had not and could not have suffered any harm because the Malpractice Suit had not yet been tried.[19] Thus, on the date of the filing of his Chapter 7 Petition, Dr. Kimbell had no cause of action against Petitioner for bad faith which could be passed on to the Bankruptcy Estate under Section 541.

Put another way, on the date of the filing of Dr. Kimbell's bankruptcy petition, his Bankruptcy Estate received only what causes of action Dr. Kimbell actually owned. Since a cause of action for bad faith could only have arisen months after his bankruptcy

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[18] *See also Romano, supra.*

[19] The act of bad faith—if one exists—*was the failure to settle the Malpractice Suit before Mrs. Camp's settlement offer expired*, and that act occurred many months after the filing of Dr. Kimbell's Chapter 7 Petition. It is undisputed that the settlement offer made by Mrs. Camp was open and did not expire until over eleven months after the filing of the Dr. Kimbell's Chapter 7 Petition. *See* App., *infra*, 19a, wherein the Court of Appeals states:

> In May 1987, St. Paul rejected a fourth offer by Camp to settle for the $250,000 policy limits.
>
> * * * *
>
> Mrs. Camp won a verdict of more than three million dollars on June 25, 1987.

petition was filed, it could not have passed to the Bankruptcy Estate.[20]

A different result should occur only if the Malpractice Suit had gone to trial and to judgment *prior* to Dr. Kimbell's bankruptcy. Under that scenario, any bad faith claim would have accrued prior to Dr. Kimbell's bankruptcy and would therefore have passed to his Bankruptcy Estate upon the filing of his bankruptcy petition.

The holding of the court of appeals is thus contrary to the plain meaning of Section 541(a)(1) which includes as discussed, *supra*, the words, "as of the commencement of the case." Congress simply did not intend that property of the estate in a Chapter 7 case would include post bankruptcy causes of action.

The Bankruptcy Estate did not become Petitioner's insured.

The court of appeals ostensibly adopted the view of the Supreme Court of Florida that "the Bankruptcy Estate 'stood in the shoes of the debtor and, in effect, the estate became the insured'."[21] Since under Florida law recovery in a bad faith case is premised on harm to the insured[22], the court of appeals' decision changed the focus

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[20] The Eleventh Circuit in *Miller v. Shallowford Community Hosp., Inc.*, 767 F.2d 1556,1559 (11th Cir.1985) in construing Section 541(a)(1) stated:

> It is clear, then, that the trustee in bankruptcy succeeds to all causes of action held by the debtor at the time the bankruptcy petition is filed, including actions 'arising from contract' such as any rights [the Debtor] may have had under his contract of insurance (citing treatise). The sole issue in this case, therefore, is whether [the Debtor] had a cause of action for optional PIP benefits at [the] time he commenced his bankruptcy proceeding.

[21] App., *infra*, 32a, quoting the Florida Supreme Court at App., *infra*, 29a.

[22] *See Cope, supra.*

from what harm, if any, Dr. Kimbell suffered[23] to what harm, if any, the Bankruptcy Estate may have suffered.[24]

Petitioner is unable to find a single reported decision (other, than of course, the decisions at bar) holding that a Chapter 7 Bankruptcy Estate becomes the 'insured' under a malpractice liability insurance policy, or any other liability insurance policy, upon the filing of a bankruptcy case. An analysis of the decision of the Supreme Court of Florida reveals a misunderstanding by that court of the purpose and working of Section 541 of the Bankruptcy Code. Section 541 simply provides that the estate succeeds to the Debtor's rights in property (e.g., real and personal property, choses in action, etc.). Section 541 does not change the *identity* of the insured under a malpractice policy. Similarly, Section 541 does not create any new cause of action based on harm to the Bankruptcy Estate resulting from the filing of an excess judgment claim. If Section 541 (or any other section of the Bankruptcy Code) did change the identity of the insured from *Dr. Kimbell* to the *Bankruptcy Estate,* the incomprehensible result would be that Petitioner's obligations under the policy would be to *insure the conduct of the estate* rather than that of Dr. Kimbell.[25]

It is readily apparent that the Eleventh Circuit's decision will have a dramatic impact on the administration of every Chapter 7 bankruptcy case in which the Debtor has incurred a pre-bankruptcy

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[23] As stated elsewhere in this Petition, Dr. Kimbell received a discharge of all of his debts *prior* to trial of the Malpractice Suit and accordingly never was liable to Mrs. Camp for any amount. Since Dr. Kimbell was not harmed by Petitioner's conduct in refusing to settle for the malpractice policy limits, there could be no recovery for bad faith as long as the "insured" was Dr. Kimbell.

[24] *See* discussion, *infra*, regarding the obscure notion of "harm to the estate".

[25] Other absurd results could follow from the adoption of such a legal principle. For example, would the Bankruptcy Estate be entitled to the Debtor's disability income proceeds under a policy existing at the time of the petition, for a disability which occurs post-bankruptcy petition? Could a Trustee on behalf of a Chapter 7 bankruptcy estate assert ownership of a Debtor's cause of action to recover from a third party for personal injury arising from an accident occurring *after* the filing of the bankruptcy case? If a post-bankruptcy petition car accident was caused by a car manufacturer's negligence in designing the car, could the bankruptcy trustee on behalf of the Bankruptcy Estate claim the products liability proceeds for the Debtor's injury?

unliquidated liability covered by liability insurance. For example, a garden variety consumer Chapter 7 case may involve a financially troubled debtor who was involved in an automobile accident prior to the filing of his bankruptcy petition. If the personal injury case had not been tried before bankruptcy, the Debtor's trustee, on behalf of the Bankruptcy Estate as the 'insured', will have to monitor the case, participate in the trial and take part in settlement negotiations.[26] The bankruptcy court will have to approve any settlement.[27] The bankruptcy case may have to remain open for months or years[28] while the personal injury claim is tried and appeals are exhausted. Moreover, a prudent insurance carrier mindful of the holding in the case at bar is not likely to take any action in the litigation after the filing of the named insured's bankruptcy without the express approval of the Trustee.[29]

It is inconceivable that Congress could have intended this result.

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[26] Petitioner argued in the courts below that at the very least the Trustee had made a *defacto* abandonment of any interest of the Bankruptcy Estate in Dr. Kimbell's insurance policy. Both the court of appeals and the Supreme Court of Florida ignored this argument and the fact that the Trustee did not participate in any way in the trial or settlement negotiations of the Malpractice Suit. Only after the excess judgment was awarded in the Malpractice Suit, did the Trustee become involved. These facts are revealed in Petitioner's deposition of the Trustee, John E. Venn which is part of the record before the district court in support of Petitioner's Motion for Summary Judgment. *See* R:II:110:58-59 in the Eleventh Circuit.

[27] *See* Rule 9019, *F. R. Bkr. P.*

[28] Dr. Kimbell's chapter 7 bankruptcy case has been open for over seven years. *See* Statement of the Case, *supra*.

[29] Pursuant to Section 330(b) of the Bankruptcy Code, a Trustee in a Chapter 7 case receives the sum of $45.00 from the Debtor's filing fee as compensation for his or her services rendered to the Bankruptcy Estate. If the Debtor has no assets for the Trustee to administer this will be the Trustee's sole compensation. Petitioner submits that it is doubtful that persons will desire to serve as Trustees in no-asset or nominal asset cases involving pre-petition liability claims because such cases will likely now require a large amount of uncompensated services and remain open for long periods of time.

A Bankruptcy Estate is not an entity which may suffer harm.

The Supreme Court of Florida determined that "[t]he [bankruptcy] estate was damaged by the addition of Mrs. Camp as an additional unsecured creditor, a result that could have been avoided if St. Paul had settled her claim."[30] App., *infra*, 30a. The supreme court's notion of 'harm to the Bankruptcy Estate' was adopted by the court of appeals which reversed the district court's grant of summary judgment to Petitioner. App., *infra*, 32a.

There is no basis in the law to maintain that a Bankruptcy Estate can be harmed by the filing of an unsecured creditor's claim. The legal fiction of a "Bankruptcy Estate" was created by Congress to facilitate the liquidation or reorganization of a debtor through the collection and distribution of a Debtor's assets in accordance with the priorities mandated by Congress. Neither the number of claimants nor the amount of their claims is significant with respect to the purpose for which Congress designed the Bankruptcy Estate. The existence of a claim, such as the excess judgment in the instant case, does not reduce the amount of assets which will be collected. Whatever assets there are will still be collected and distributed to creditors.

In *Harris v. Standard Accident & Insurance Company*, 297 F.2d 627 (2nd Cir. 1961), *cert.denied* 369 U.S. 843 (1962), a remarkably similar case to the case at bar, the Second Circuit recognized that the party which is truly harmed when an insurer's bad faith results in an excess judgment is the creditor[31] of the insured-bankrupt who will receive a smaller pro-rata distribution from the estate -- not the estate itself. The Court in *Harris* questioned whether, under New

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[30] In fact, Mrs. Camp was not *added* as a creditor to the bankruptcy estate. According to the record before the District Court and the Court of Appeals, Mrs. Camp had filed a proof of claim shortly after the filing of Dr. Kimbell's bankruptcy petition claiming an *unliquidated* indebtedness. In resolving Mrs. Camp's motion for relief from the automatic stay, the Bankruptcy Court ordered that the Malpractice Suit be tried for the sole purpose of liquidating the Camps' claim in the Chapter 7 case. App., *infra*, 6a-7a.

[31] See, for example, *Mixon v. Anderson*, 816 F.2d 1222 (8th Cir.), *cert. denied*, 108 S.Ct. 147 (1986) for the proposition that a cause of action asserting an alter ego theory is not property of the Bankruptcy Estate since it belongs to the estate's creditors only and can only be acted upon by them.

York law, any duty was owed by the insurer to creditors in such a case.[32] *Harris*, 297 F.2d. at 636.

Petitioner submits that the Second Circuit's analysis in *Harris* is correct and that this Court should resolve the conflict between the Eleventh and Second circuits respecting the notion of 'harm' to a Bankruptcy Estate.

The Court of Appeals improperly adopted the responses to its certified questions.

On appeal from the district court, the court of appeals certified two questions to the Supreme Court of Florida. The court of appeals stated that it certified these questions because the case at bar involved questions of unresolved Florida law and because of "the novelty and importance of the issues raised." App., *infra*, 23a. As suggested by Petitioner, *supra*, the Supreme Court of Florida based its response to these questions on a grossly erroneous view of federal bankruptcy law. The Eleventh Circuit ostensibly adopted this view in its final opinion without analysis.

The first certified question asked the Supreme Court of Florida whether the *Cope* precedent requiring harm to the insured as a prerequisite to bringing a bad faith cause of action would govern the facts of the case at bar where the named insured was never personally liable because of his bankruptcy discharge. App., *infra*, 23a. The Supreme Court of Florida determined that because Dr. Kimbell's policy had become property[33] of Dr. Kimbell's Bankruptcy Estate[34], it necessarily followed that the "estate became the insured." *Id.* It cited *Palmer v. Travelers, Ins. Co.*, 319 F.2d 296 (5th Cir.1963) to

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[32] This question has been answered in Florida by the Florida Supreme Court which held in *Cope* that an insurance carrier owes no duty to third parties.

[33] In most cases a liability insurance policy becomes only a *nominal* asset of the Bankruptcy Estate because its proceeds are *not* owned by the Bankruptcy Estate, but instead by the victim of the Debtor's conduct. For a good discussion in a recent case regarding this issue, see *Houston v. Edgeworth*, 993 F.2d 51 (5th Cir.1993).

[34] "Thus, in the instant case, the bankruptcy estate holds Dr. Kimbell's insurance policy as an asset because it was an interest of the debtor when the bankruptcy suit (sic) was filed in July 1986." App., *infra*, 29a.

support this holding. Its reliance on *Palmer* is extraordinarily misplaced since *Palmer* involved an excess judgment which was entered against the insured over three months *before* bankruptcy was filed.

Thus, in *Palmer* the chose in action against the insurance carrier was in existence at the time of the filing of the bankruptcy and therefore unquestionably became part of the Bankruptcy Estate under Section 541(a) of the Bankruptcy Code.

The second certified question dealt with whether the language in the insurance policy could authorize a suit by the Trustee where the named insured was not personally liable. The Supreme Court of Florida found that the language meant that "even if the insured filed bankruptcy [Petitioner] would bear the duty to defend and pay off a claim up to the policy limits."[35] App., *infra*, 29a. Having found that the Bankruptcy Estate was the 'insured', the Supreme Court of Florida concluded that this duty would now be to the Bankruptcy Estate and that Petitioner should have known that its failure to settle could affect the Bankruptcy Estate by increasing the debt of the estate to the detriment of its creditors.

As with the first certified question, the Supreme Court of Florida's conclusion is based on a misunderstanding of federal bankruptcy law.[36]

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[35] Compare with the conclusion of the district court:

> The clause does not affect the application of the law of Florida and the particular way the judgment was entered in accordance with that law. Moreover, I believe that the clause in question more plausibly refers only to St. Paul's duty to defend Kimbell and to pay off its claim up the policy limits, a duty clearly contemplated by the parties, regardless of Kimbell's bankruptcy or insolvency.

App., *infra*, 11a.

[36] See discussion, *supra*, beginning at p. 10.

Petitioner submits that the Eleventh Circuit should not have adopted the erroneous views of the Supreme Court of Florida on federal bankruptcy law.[37] It was not bound by such views[38], but by summarily adopting them, it has made significantly erroneous federal precedent which this Court should overturn.

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[37] In a case involving the erroneous interpretation of federal constitutional law by the Supreme Court of Florida in that court's response to certified questions, the former Fifth Circuit has held that it was *required* to ignore the holding of the state court if the decision was based upon what it believed to be erroneous determinations of federal law. *See Sun Insurance Office v. Clay*, 319 F.2d 505 (5th Cir.1963), *rev'd. on other grounds* 84 S.Ct. 1197, 377 U.S. 179, 12 L.Ed.2d 229 (1964).

[38] *See Smith v. Estelle*, 445 F. Supp. 647, 661 (N.D. Tex.1977), *aff'd* 602 F.2d 694, *reh. den.* 606 F.2d 321 (5th Cir.1979), *cert. granted* 100 S.Ct. 1311, 445 U.S. 926, 63 L.Ed.2d 758, *aff'd* 101 S.Ct. 1866, 451 U.S. 454, 68 L.Ed.2d 359 (1981).

CONCLUSION

Under the Bankruptcy Code, a chose in action (i) which is based on alleged conduct occurring months after a Chapter 7 Bankruptcy is filed and (ii) which under state law does not accrue until months after the filing does *not* become property of the Bankruptcy Estate under Section 541.

The Bankruptcy Code does not effect a change by operation of law in the *identity* of the named insured in a liability insurance policy owned by the Debtor at the time of bankruptcy such that the insurance carrier's duties to the named insured arising under the policy are owed to the Bankruptcy Estate.

Under federal bankruptcy law, a Bankruptcy Estate is not an entity which can be 'harmed' by the increase in claims filed against it.

The Eleventh Circuit improperly adopted the Supreme Court of Florida's erroneous views of federal bankruptcy law thereby causing such view to become binding federal precedent. The petition for writ of certiorari should therefore be granted. The Court may wish to consider summary reversal.

Respectfully submitted.

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September 15, 1993

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

No. 89-30035-RV

ANNA RUE CAMP, ET AL.
Plaintiffs

v.

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY
Defendant

ORDER GRANTING SUMMARY JUDGMENT
C. Roger Vinson, District Judge, Presiding

[Filed: February 12, 1991]

Pending are cross-motions for summary judgment filed by defendant St. Paul Fire and Marine Insurance Company ("St. Paul") (doc. 105) and the plaintiffs, Anna Rue Camp and John E. Venn, as trustee of the state of Fariss D. Kimbell, Jr., M.D., (doc. 90). For the reasons stated below, I GRANT defendant's motion and DENY the plaintiffs' motion.

This diversity case arises out of a medical malpractice action brought in state court by plaintiff Anna Rue Camp against Dr. Fariss D. Kimbell, Jr., the insured. Defendant St. Paul was Dr. Kimbell's liability insurance carrier. Pursuant to a jury's verdict, a judgment of over $3 million was entered in favor of Camp, but with specific conditions discussed below. The judgment is well in excess of St. Paul's $250,000 liability insurance policy limit. Prior to the entry of the judgment, but during the pendency of the malpractice litigation and approximately nine months before trial, Dr. Kimbell received a discharge in bankruptcy. The discharge specifically included the then-pending claim of Anna Rue Camp. St. Paul paid Camp the full $250,000, plus interest, of the policy limits following exhaustion of appeal in the state courts. This litigation involves the "excess" amount. Plaintiff John E. Venn is the trustee of Dr. Kimbell's bankruptcy estate. Venn and Camp have sued St. Paul under Florida law for bad faith failure to defend Kimbell's claim (which includes bad faith failure to settle).

A motion for summary judgment should be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Rule 56(c), Fed.R.Civ.P. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S.Ct. 2548, 2552, 91 L.Ed.2d 265 (1986); *Everett v. Napper*, 833 F.2d 1507, 1510 (11th Cir.1987). "The moving party is entitled to judgment as a matter of law if the nonmoving party cannot sufficiently show an essential element of the case to which the nonmoving party has the burden of proof." *Cornelius v. Town of Highland Lake*, 880 F.2d 348, 351 (11 Cir.1989), *cert. denied sub nom., Spears v. Cornelius*, ---- U.S. ----, 110 S. Ct. 1784, 108 L.Ed.2d 785 (1990).

However, summary judgment is improper "[i]f a reasonable fact finder could draw more than one inference from the facts, and that inference creates a genuine issue of material fact." *Id.* An issue of fact is "material" if it might affect the outcome of the case under the governing law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202, 211 (1986). It is "genuine" if the record taken as a whole could lead a rational trier of fact to find for the non-moving party. *See Matsushita Electric Indus. Co., Ltd. v.*

Zenith Radio Corp., 475 U.S. 574, 586, 106 S.Ct. 1348, 1355, 89 L.Ed.2d 538, 552 (1986).

On a summary judgment motion, the record and all inferences that can be drawn from it, must be viewed in the light most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655, 82 S.Ct. 993, 994, 8 L.Ed.2d 176, 177 (1962). Furthermore, the court must consider the entire record in the case, not just those pieces of evidence which have been singled out for attention by the parties. *See Clinkscales v. Chevron USA, Inc.*, 831 F.2d 1565, 1570 (11th Cir.1987).

I. *GENUINE ISSUE REGARDING THE UNDERLYING BAD FAITH CLAIM.*

Preliminarily, both St. Paul and the plaintiffs argue, respectively, that there is no genuine issue of material fact regarding St. Paul's bad faith, and each of them maintain, therefore, that they are entitled to judgment as a matter of law. In summary, St. Paul argues that (1) it relied on the favorable reviews of consulting physicians Greer and Sullivan; (2) it offered several times to settle the case for amounts up to $150,000; (3) it sought and received two legal opinions regarding the effect of Kimbell's bankruptcy on its duty to attempt to settle; and (4) Kimbell said he did not want the matter settled.

Plaintiffs, on the other hand, point to evidence they believe establishes bad faith. Regarding the reasonableness of its settlement offers, plaintiff submits evidence that Camp's attorney had informed St. Paul that Camp's medical expenses *alone* were $130,000. The record suggests that St. Paul's attorney, at least at one point, was not optimistic about Kimbell's chance of success at trial and advised settlement at $200,000 to $225,000, figures much higher than St. Paul ever offered and very close to the policy limits, and it is undisputed that Camp's attorney offered to settle at the policy limits of $250,000.

Most convincing is St. Paul's argument that it relied on the advice of counsel that Kimbell's bankruptcy eliminated his personal exposure to judgment in excess of the insurance coverage on Mrs. Camp's claim, thus rendering harmless an excess judgment against him. However, given the amount of relevant evidence supporting each side, I cannot say that a rational fact-finder must find for or

against plaintiff in this instance. More importantly, there are many genuine issues of material fact concerning the underlying bad faith claim, precluding summary judgment for either plaintiffs or defendant.

The relevance of defendant's "good faith reliance" evidence also leads to the denial of plaintiffs' motion, filed in the alternative with its summary judgment motion, to exclude all evidence regarding Kimbell's bankruptcy. Plaintiffs argue that St. Paul has waived the use of any evidence of this nature because it would involve the testimony of attorney Elmo R. Hoffman, who gave the advice in question. Hoffman is presently representing St. Paul in this litigation. Plaintiffs point out that Hoffman cannot testify at trial on this issue and represent St. Paul at the same trial.

St. Paul responds that it does not need to, or intend to, call Hoffman as a witness at trial. Rather, it intends merely to have its employee witnesses identify Hoffman's letters to St. Paul, offer such letters in evidence, and testify as to the extent to which St. Paul relied on those opinions. Thus, if not offered for the truth of the opinion set out in the letters, it would not be necessary for Hoffman to testify. If this is all that trial necessitates, disqualification of Mr. Hoffman will not be necessary. I find that there has been no waiver of the use of this evidence. In any event, the evidence is certainly competent and material to the pending Rule 56 motions, and plaintiffs' motion is DENIED.

II. CAMP'S STANDING.

Venn and Camp have agreed that any recovery made against St. Paul will be payable to Kimbell's bankruptcy estate, and that Camp will only share in these funds as an unsecured creditor of Dr. Kimbell's bankruptcy estate. Thus, Camp does not have independent standing to sue St. Paul. The cause of action, if any, is Venn's alone, as trustee of the bankruptcy estate. Camp is hereby DISMISSED as a plaintiff in this case.

III. *EFFECT OF INSURED'S BANKRUPTCY ON INSURER'S LIABILITY.*

The unique and interesting issue in this case, however, is a legal one: whether Dr. Kimbell's discharge in bankruptcy prior to trial relieves St. Paul of any potential bad faith liability under the law of Florida. I conclude that it does, as discussed below.

(A) *Direct action bad faith claims.* Florida has long recognized a common law cause of action for bad faith claims for an insurance company's failure to settle (or defend) third-party actions within the policy limits, thereby exposing the insured to a judgment in excess of the insurance coverage. The cause of action was the insured's alone. An assignment of the bad faith claim from the insured to the third-party injured party/judgment creditor was a prerequisite to any action by the injured third-party against the insurance company. However, in *Thompson v. Commercial Union Ins. Co.*, 250 So.2d 259 (Fla.1971), the Supreme Court of Florida authorized the third-party to maintain a direct bad faith claim against an insurer. *Id.* at 264. *See also Boston Old Colony Ins. Co. v. Gutierrez*, 386 So.2d 783 (Fla.1980). In the absence of Dr. Kimbell's bankruptcy discharge, Camp would clearly have a bad faith cause of action.

However, St. Paul contends that the Supreme Court of Florida's decision in *Fidelity and Casualty Co. v. Cope*, 462 So.2d 459, 460-461 (Fla.1985), eliminates the plaintiff's legal cause of action under the facts of this case.

The issue in *Cope* was whether an injured third-party who has secured an excess judgment can maintain a bad faith claim against the insurer under *Thompson* when the injured party has executed a release of his claim against the tortfeasor. 462 So.2d at 459. The Court explicitly reaffirmed the *Thompson* principle that an injured third party may bring a bad faith claim directly against an insurer, but went on to say:

> Nowhere in *Thompson*, however, did we change the *basis or theory of recovery*. We did not extend the duty of good faith by an insurer to its insured to a duty of an insurer to a third party. The basis for an action remained the damages of an insured from the bad faith action of the insurer which caused its insured to suffer

a judgment for damages above his policy limits. *Thompson* merely allowed the third party to bring such an action in his own name without an assignment.

> *Fidelity and Casualty Co. v. Cope, supra,* 462 So.2d at 460-461 (emphasis added).

Thus, it is well-settled that, in Florida, the insurance company owes no duty to an injured third party who has obtained a judgment against the company's insured. The third party's cause of action, if any, is "not separate and distinct from, but [is] derivative of," the insured's. *Id.* at 461. As a result, a satisfaction and/or release of the insured destroys the third party's derivative cause of action.

The Eleventh Circuit applied the principle of *Cope* in *Clement v. Prudential Property & Casualty Co.*, 790 F.2d 1545 (11th Cir.1986). There, the injured third party did not execute a release of the insured's liability, as in *Cope*. Instead, the third party settled the underlying litigation for $75,000, with the understanding that the insured would not personally be liable for any amount over $10,000, the policy limit. In return, the insured agreed to prosecute a bad faith action against his insurer, assigning the benefits to the third party. *Id.* at 1546. The Eleventh Circuit held that *Cope* applied to bar the insured's resulting bad faith action. Since the insured was "released from liability for any damages he might have suffered as a result of the insurer's bad faith," the court reasoned, Florida law disallowed any bad faith claim absent prior assignment of that claim. *Id.* at 1548.

(B) *Effect of insured's bankruptcy.* Relying on *Clement*, St. Paul contends that *Cope* applies because Dr. Kimbell has been discharged in bankruptcy and cannot be personally liable for any damages in excess of the policy limits. Dr. Kimbell filed for bankruptcy on July 9, 1986. On April 13, 1987, the bankruptcy judge modified the automatic stay afforded under the Bankruptcy Code so as to allow Camp's state court malpractice action Dr. Kimbell to proceed. *See* attachments to doc. 2. The judge ordered that:

> any judgment entered in such action shall be for the full amount of the claim of Harvey and Anna Rue Camp and shall thereby liquidate such claim for purposes of this Chapter 7 case; *provided,*

however, that such judgment shall not be enforceable against the Debtor as a personal liability of the Debtor. Id. (emphasis added).

Final judgment against Dr. Kimbell was entered in state court on June 25, 1987. The state circuit court judge referred to the April 13, 1987, bankruptcy order in the final judgment. Thereafter Dr. Kimbell moved for an order to cancel and discharge the judgment. On January 11, 1989, an order was entered in the state circuit court, ordering that: "...pursuant to Section 55.145, Florida Statutes, the judgment against Defendant Fariss D. Kimbell is hereby canceled and discharged." *See* doc. 106, Ex. A. Section 55.145 provides in pertinent part:

> If it appears ... that the bankrupt or debtor has been discharged ... the Court shall enter an order canceling and discharging said judgment. *The order of cancellation and discharge shall have the same effect as a satisfaction of judgment....*
>
> § 55.145, Fla.Stat. (1985) (emphasis added.)

Subsequently, on December 15, 1988, the bankruptcy judge entered an order which acknowledged the state court judgment and allowed that judgment as a general, non-priority unsecured claim. *See* attachments to doc. 2. The court again ordered that "such judgment and such claim shall not be enforceable against Debtor." *Id.*

St. Paul's argument on this issue places special emphasis on Section 55.145, which states that a discharge in bankruptcy shall "have the same effect as a satisfaction of judgment." If the judgment has been "satisfied" as to the insured, St. Paul argues, then *Cope* applies and plaintiffs have no cause of action.

Plaintiffs counter that Kimbell's bankruptcy estate is still responsible for payment of creditors' claims, including Camp's excess judgment; therefore, the estate (represented by its trustee) may still recover from the insurer. They claim harm to the estate through the increased amount of claims against the estate, to the detriment of all creditors. According to the plaintiffs, the Florida statutory language providing for "the same effect as a satisfaction of the judgment" must refer only to the personal liability of the insured;

that it was not intended to bar recovery from an insurer whenever the insured went bankrupt.

The answer to this argument, I believe, is that the insurer's duty of good faith runs to the insured alone, as the *Cope* opinion makes very clear. As the Supreme Court of Florida indicated, the bankruptcy estate's cause of action is entirely derivative of the insured's, and is extinguished once the insured is released from obligations stemming from the underlying judgment. The underlying judgment could not be more clear: Kimbell was never personally liable for the excess judgment. Under the law of Florida, his discharge in bankruptcy had the effect of "satisfying" that judgment with respect to him. Further, the discharge was well before trial and long before judgment was entered. As the bankruptcy judge's order makes perfectly plain in the order of April 13, 1987, any judgment in the *Camp* litigation "shall not be enforceable against the Debtor as a personal liability." Therefore, Kimbell was, before trial, "released from liability for any damages he might have suffered as a result of the insurer's bad faith." *See Clement, supra,* 790 F.2d at 1548. As a result, *Cope* and *Clement* control, and St. Paul cannot be liable for any alleged bad faith in defending Dr. Kimbell.

The parties have cited no Florida authority addressing whether an insured's discharged in bankruptcy destroys his claim against an insurer, let alone the claim of a third party or bankruptcy trustee whose cause of action derives from the insured's. My research has indicated that this is a matter of first impression under Florida law. St. Paul cites *Harris v. Standard Accident and Ins., Co.,* 297 F.2d 627 (2d Cir.1961), *cert. denied,* 369 U.S. 843, 82 S.Ct. 875, 7 L.Ed.2d 847 (1962), which supports its view. The Second Circuit held that where an insured, who was insolvent before the excess judgment paid no part of the judgment, and was discharged in bankruptcy, he suffered no damage; thus, the bankruptcy trustee could not maintain a bad faith action absent proof that the insurer *caused* the insured's bankruptcy. Other cases have reached this result as well. *See, e.g., Bourget v. Government Employees Ins. Co.,* 456 F.2d 282 (2d Cir. 1972). The facts of *Harris* are, of course, somewhat different from those of this case.

Plaintiffs cite a number of cases reaching a different conclusion. *See Torrez v. State Farm Mut. Auto Ins. Co.*, 705 F.2d 1192, 1198 n. 2 (10th Cir.1982), *supra, citing National Farmers Union Property & Casualty Co. v. O'Daniel, Administrator*, 329 F.2d 60 (9th Cir.1964); *Lee v. Nationwide Mut. Ins. Co.*, 286 F.2d 295 (4th Cir.1961); *Maguire v. Allstate Ins. Co.*, 341 F.Supp. 866 (D.Del.1972); *Sweeten, Administrator v. National Mut. Ins. Co.*, 233 Md. 52, 194 A.2d 817 (1963); *Wolfberg, Administrator v. Prudence Mut. Casualty Co.*, 98 Ill.App.2d 190, 240 N.E.2d 176 (1968). *See also Purdy v. Pacific Automobile Ins. Co.*, 157 Cal.App.3d 59, 203 Cal. Rptr. 524 (2d Dist.1984); *Carter v. Pioneer Mut. Casualty Co.*, 67 Ohio St.2d 146, 423 N.E.2d 188, 191-192 (1981).

I do not find these cases to be persuasive, however, for at least three reasons. First, there are significant differences between a decedent's estate, involved in all of these cases except *Purdy*, and an estate in bankruptcy. A decedent's estate is (excluding suicide) involuntary and has no conditions precedent. The decedent is not seeking an economic rebirth. Assets and liabilities of the decedent discovered, or arising, after death are unquestionably the assets and liabilities of the decedent's estate. Therefore, if an insured has no assets so that he is essentially judgment-proof during his lifetime, there is no reason to treat his estate differently after his death. A cause of action for bad faith should be recognized, regardless of whether it arose before or after death. The personal representative of the estate should be able to pursue the claim.

On the other hand, an estate in bankruptcy serves a very limited statutory function. Strict conditions precedent apply to a debtor's discharge. Usually, the bankruptcy is voluntary (as was Dr. Kimbell's). The debtor clearly intends to live a new, post-bankruptcy, economic existence. Neither the filing nor the discharge can be the equivalent of death. Post-discharge income, assets and liabilities of the debtor are ordinarily unaffected by the bankruptcy. Under Florida law, a bad faith claim is personal to the insured. Thus, if a cause of action for bad faith arises after discharge, it must belong (assuming, of course, that a cause of action can arise under such circumstances) to the insured and cannot be claimed as an asset by the bankruptcy trustee. The cause of action for bad faith does not follow the discharged claim, nor can it logically be split or divided between the debtor and the trustee. Therefore, the rationale of the

decedent's estate cases does not necessarily apply to an estate in bankruptcy.

Second, these cases cited by plaintiff are not dealing with the specific law of Florida. Under *Cope*, a satisfaction or release of the insured destroys the third party's derivative cause of action for bad faith. Section 55.145 provides that an order of cancellation and discharge shall "have the same effect as a satisfaction of the judgment." That is the status of the *Camp* judgment.

Third, the specific language of the bankruptcy judge's order relieved Dr. Kimbell of any potential liability for an excess judgment before any judgment was entered. No judgment liability or judgment lien ever arose or attached to Dr. Kimbell with regard to the excess. Under *Cope* and *Clement*, no cause of action can arise under such circumstances.

The plaintiffs further argue that the language of Kimbell's insurance policy preclude a finding that his discharge in bankruptcy immunizes St. Paul of bad faith liability. They analogize to the Tenth Circuit's decision in *Torrez, supra*, and the District Court of Delaware's opinion in *Maguire, supra*, wherein the policy's terms provided that "insolvency" or "bankruptcy" of the insured did not relieve the insurer of its obligations. The wording in the two policy clauses involved in those cases was almost identical to the corresponding clause in Kimbell's policy.[39] These decisions point out that since two of the insurer's obligations under the policy were to defend and/or settle, the clause constituted a waiver by the insurer of any insolvency defense.

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[39] In Dr. Kimbell's policy, St. Paul promises: "If the protected person or his or her estate goes bankrupt or becomes insolvent, we'll still be obligated under this policy." Doc. 141, Ex. 28, at 8.

The policy language in *Maguire* read: "Bankruptcy or insolvency of the insured or of the insured or his estate shall not relieve the Allstate of any of its obligations." *Maguire*, 341 F.Supp. at 869.

The corresponding clause in *Torrez* read: "Bankruptcy or insolvency of the insured or of the insured's estate shall not relieve the company of any of its obligations hereunder." *Torrez*, 705 F.2d at 1196.

Although I do not agree with the *Torrez* and *Maguire* interpretation of Kimbell's policy language, it is not necessary to construe that language under the facts of this case. The clause does not affect the application of the law of Florida and the particular way the judgment was entered in accordance with that law. Moreover, I believe that the clause in question more plausibly refers only to St. Paul's duty to defend Kimbell and to pay off its claim up to the policy limits, a duty clearly contemplated by the parties, regardless of Kimbell's bankruptcy or insolvency. It seems unnecessary to extend the reach of this clause to St. Paul's duty of good faith regarding settlement because the bankruptcy judge's orders and Camp's judgment itself make it clear that any such duty was extinguished upon the insured's discharge in bankruptcy. Kimbell's discharge, well before the judgment was entered, eliminated a critical element in any cause of action for bad faith: the potential exposure of Kimbell personally to a judgment in excess of the policy limits.

Finally, the plaintiffs argue that the result urged by St. Paul is unattractive on policy and common-sense grounds. As the former Fifth Circuit's (later Chief) Judge Brown noted, in agreement with allowing the bankruptcy estate to pursue the claim and finding no Georgia law on the issue:

> Any other result would be to allow an insurer to default, *drive its assured to the wall of bankruptcy*, and then blithely advise the estate, the trustee, the assured and all of the creditors that while its duty was breached, there is nothing to be done about it.
>
> *Palmer v. Travelers Ins. Co.*, 319 F.2d 296, 300 (5th Cir.1963)(Brown, J., concurring) (emphasis added).

This reasoning is only convincing when applied to the case where the insurer's bad faith leads to an excess judgment which *causes* the insured to go into bankruptcy (which is how Judge Brown applied it). Since bankruptcy itself is an injury,[40] the insurer's breach of its

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[40] *See, e.g., Smoot v. State Farm Mut. Auto Ins. Co.*, 299 F.2d 525 (5th Cir.1962). Ruling that payment of the judgment by the insured was not a prerequisite to a bad faith suit, the Fifth Circuit further suggested the bankruptcy of the insured

duty in this case has caused its insured's bankruptcy, for which the insured may be compensated. *See Harris v. Standard Accident & Ins. Co.*, 297 F.2d 627, 632 (2d Cir.1961), *cert. denied*, 369 U.S. 843, 82 S.Ct. 875, 7 L.Ed.2d 847 (1962); *Young v. American Casualty Co.*, 416 F.2d 906, 911-912 (2d Cir.1969), *cert. dismissed, Myles v. Procunier*, 396 U.S. 997, 90 S.Ct. 580, 24 L.Ed.2d 490 (1970); *see also Larrabaru Bros., Inc. v. Royal Indemnity Co.*, 604 F.2d 1208, 1210, 1215 (9th Cir.1979) (California law); *Anderson v. St. Paul Mercury Indemnity Co.*, 340 F.2d 406, 409 (7th Cir.1965) (Indiana law). The plaintiffs adopt this theory when they argue, alternatively, that St. Paul's bad faith caused Kimbell's bankruptcy. I now turn to this issue.

(C) *Whether St. Paul's Bad Faith Caused Dr. Kimbell's Bankruptcy.* After an exhaustive review, I find that the record shows that there is no genuine issue of fact on this question, and that St. Paul's alleged bad faith was *not* the cause of Kimbell's bankruptcy.[41] Plaintiffs point to a June 10, 1985, letter from Mr. Westmoreland, Kimbell's bankruptcy attorney, to Mr. Bozeman, St. Paul's counsel, in which Westmoreland states that Kimbell's potential excess exposure was "a factor" in the decision to file for bankruptcy. Doc. 141, Ex. 18.

Naturally, the best source must be Dr. Kimbell himself. His affidavit (doc. 145) states that the Camp suit precipitated Baptist Hospital's summary suspension of his staff privileges, which reduced his referrals. (His privileges were eventually restored in

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would not extinguish his right of action, either, assuming causation by the insured:

> There are further acute factors which demonstrate that taking bankruptcy itself is a damage, e.g. cost, attorney fees, surrender of much property otherwise exempt from local execution, and the like.

Id. at 530 n. 11.

[41] Initially, I note that there is no claim that Dr. Kimbell fraudulently entered into bankruptcy, either in collusion with St. Paul or otherwise, to somehow escape liability. Thus, plaintiffs have waived use of the provision for revocation of discharge obtained by fraud. *See* 11 U.S.C. § 1328.

November 1985, after he had taken refresher training.)[42] The reduction in referrals, in turn, substantially decreased his income and earning capacity, forcing him to "consider" bankruptcy. *Id.* ¶¶ 8-10.

In his deposition, which is a more reliable and complete item of evidence, Kimbell makes it apparent that *several* major factors were at work, including the *two* malpractice suits then pending against him. More pressing and of concern to Dr. Kimbell were his obligations under several failed marriages, his large preexisting debts, and his abrupt loss of income. *See* Kimbell dep. at 89. He further states that he left the decision to file bankruptcy up to Westmoreland, his attorney, and never explicitly instructed Westmoreland to file. *Id.* at 80. Kimbell was unable to pinpoint any period as the time he decided to file, saying instead that "as each month came into play [after February 1985, when his income precipitously dropped] ... it was obvious to me that I could not pay my debts and that I would have to go bankrupt under the circumstances." *Id.* at 90.

Although Kimbell does not explicitly attribute his bankruptcy to a single cause in his deposition, his detailed description of the dire financial conditions with which he was struggling long before the Camp suit was filed show that there is no "but for" causation in this case. Kimbell testified that before 1985, he was "deep in debt" with "a lot of obligations". *Id.* at 34. He was living from month to month with no savings. *Id.* at 59. However, he was able to meet his obligations as long as his income continued. *Id.* at 34.

In February 1985, his income drastically dropped, from a monthly average of roughly $17,000 to a February income of $2,000. As a result, he became unable to carry his notes. His income improved only marginally after that, and then dropped to virtually nothing. *Id.* at 44, 65. Kimbell testified that this was the beginning of the financial difficulties that led to his bankruptcy. *Id.* at 59, 89.

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[42] *See id.* at 63. I note that Kimbell's privileges at Sacred Heart Hospital were *not* suspended. Kimbell stated, nonetheless, that there was substantial overlap between the doctors practicing at both hospitals and the area generally; once his suspension at Baptist became known, referrals came few and far between.

Moreover, he began seriously considering bankruptcy at this time. *Id.* at 59.

Kimbell also testified that there was approximately a six-month lag between the performance of his services and his payment for them through the various health insurers. *Id.* at 46. If true, calculating backward from February 1985, his practice difficulties must have started as early as August of 1984, five months before the Camp lawsuit was filed in December of 1984.

After Baptist Hospital suspended his privileges, Dr. Kimbell continued to suffer from a sharply reduced income. He consulted attorney Westmoreland about filing for bankruptcy in April or May of 1985; they decided first to try to sell his Pensacola properties to pay some of his debts and thereby avoid bankruptcy. *Id.* at 61. He stopped practicing in May, he closed his office in June, and went unemployed for over three months. *Id.* at 61 - 62.

In October 1985, he went to work as an associate neurosurgeon in Fort Lauderdale for approximately $70,000 a year - roughly $6,000 per month. *Id.* at 65. At this time, Kimbell was still hopeful he could avoid bankruptcy. *Id.* at 78. After deciding in early July 1986 that his employer had secretly hired him as merely temporary help, he filed his bankruptcy petition on July 11 and officially resigned his position on July 25. *Id.* at 76. At all times, he employed his own private, independent counsel regarding the bankruptcy decision. There is absolutely nothing in the record to indicate that St. Paul aided or actively encouraged his bankruptcy filing.

This chronology demonstrates that Kimbell would have gone bankrupt, independent of any bad faith on the part of St. Paul. The record reflects that his liabilities well exceeded his assets, without any consideration of the Camp suit. The practice difficulties leading to Kimbell's drastic decrease in income apparently started before Camp filed suit. This independent income reduction, by itself, rendered Kimbell unable to meet his obligations and forced him to start liquidating whatever he could sell before he finally filed in July 1986.

Further, Baptist Hospital's suspension of privileges occurred several weeks after Camp filed suit. Even if St. Paul acted in the

best of good faith, it is not reasonable to expect that it would have settled at the policy limits so quickly. Thus, with or without such a settlement, Kimbell would have lost his privileges, and with it, his referrals. Plaintiffs have submitted no evidence showing that a later settlement by St. Paul would have triggered the restoration of his Baptist privileges earlier than November 1985, when they were actually restored, and it would be sheer speculation to infer that a settlement would have done so. Therefore, I conclude that no reasonable factfinder could find that any alleged bad faith by St. Paul was a factual, let alone a proximate, cause of Kimbell's bankruptcy.

IV. *CONCLUSION.*

For the foregoing reasons, I find that St. Paul is entitled to judgment as a matter of law. St. Paul's motion for summary judgment is GRANTED, and plaintiffs' is DENIED. All other pending motions are DENIED, as moot.

DONE AND ORDERED.

APPENDIX B

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 91-3213

ANNA RUE CAMP AND JOHN E. VENN,
AS TRUSTEE OF
THE ESTATE OF FARISS D. KIMBELL, JR., M.D.
Plaintiffs-Appellants

v.

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY
Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Florida
C. Roger Vinson, District Judge, Presiding

[Filed April, 16, 1992]

Before: KRAVITCH, ANDERSON and BIRCH, Circuit Judges

BIRCH, Circuit Judge:

This diversity case involves the intersection of insurance bad faith law and bankruptcy law. The defendant, St. Paul Fire and Marine Insurance Company ("St. Paul"), is the insurer of Dr. Fariss Kimbell, a neurosurgeon who became bankrupt in late 1986. After the bankruptcy, Dr. Kimbell was found liable for medical malpractice in his treatment of plaintiff Anna Rue Camp. The jury returned a verdict of more than three million dollars, well in excess of Dr. Kimbell's $250,000 policy limits. After the verdict, Camp joined the

trustee of Kimbell's bankruptcy estate, plaintiff John E. Venn, in suing St. Paul to recover the excess amount of the verdict. The basis of their lawsuit was St. Paul's alleged bad faith refusal to settle Camp's claim prior to the large judgment.

The United States District Court for the Northern District of Florida granted summary judgment to St. Paul. The court reasoned that because Dr. Kimbell's bankruptcy prior to the verdict prevented Dr. Kimbell's personal liability for any excess judgment, St. Paul's alleged bad faith did not harm its named insured. Therefore, the court concluded that St. Paul could not be sued for bad faith under Florida law. *See Camp v. St. Paul Fire and Marine Ins. Co.*, 127 B.R. 879, 882-86 (N.D.Fla. 1991).

We agree with the district court that the plaintiffs' lawsuit raises issues of first impression under Florida law. *Id.* at 884. We also believe that the resolution of these important questions of law will be determinative of their cause. Accordingly, we certify two questions to the Florida Supreme Court pursuant to Article V of the Florida Constitution. *See* Fla. Const. art. V, § 3(b)(6).

CERTIFICATION FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT TO THE SUPREME COURT OF FLORIDA PURSUANT TO ARTICLE V, SECTION 3(b)(6) OF THE FLORIDA CONSTITUTION.

TO THE SUPREME COURT OF FLORIDA AND THE HONORABLE JUSTICES OF THAT COURT:

I. BACKGROUND

A. *General Factual Background*

The insurance policy issued by St. Paul's in favor of Dr. Kimbell covered the doctor for medical malpractice up to a limit of $250,000 per person injured. The policy also contained this language:

> Once liability has been determined by judgement or by written agreement, the party making the claim may be able to recover under this policy, up to the limits of your coverage. But that party can't sue us directly or join us in a suit against the

> protected person until liability has been so determined. If the protected person or his or her estate goes bankrupt or becomes insolvent, we'll still be obligated under this policy.

While this policy was in force, Dr. Kimbell performed the procedures which resulted in Camp's injuries. Camp's lawyers threatened to sue Dr. Kimbell for medical malpractice. In July 1984, Dr. Kimbell notified St. Paul about Camp's claim.

St. Paul began the defense of Dr. Kimbell shortly thereafter. On December 10, 1984, Camp sued Dr. Kimbell for medical malpractice in Florida state court. Between the time that Camp's malpractice suit was filed at the end of 1984 and July of 1986, there were two important developments relevant to the present case. First, Dr. Kimbell's financial condition began deteriorating. He had large debts prior to Camp's lawsuit. In addition, the Camp lawsuit, as well as another medical malpractice suit, started to affect the doctor's ability to earn money. Specifically, an investigation of Dr. Kimbell, prompted by the two lawsuits, eventually led to the suspension of Dr. Kimbell's privileges at one of the hospitals where he practiced neurosurgery. That suspension led to fewer referrals, less income, and the concomitant financial instability.

Second, Camp twice offered to settle with St. Paul for Dr. Kimbell's policy limits of $250,000. The settlement requests were made on June 3 and November 5 of 1985. St. Paul rejected both settlement offers. At the time the second offer was rejected, St. Paul was at least aware of Dr. Kimbell's financial difficulties.

In July of 1986, Dr. Kimbell filed a Chapter 7 bankruptcy case in the United States Bankruptcy Court for the Northern District of Florida. Pursuant to the automatic stay of 11 U.S.C. § 362 (1988), Camp's state lawsuit was halted. While Dr. Kimbell's bankruptcy case was proceeding, Camp offered to settle with St. Paul for the policy limits for the third time. On September 19, 1986, St. Paul again rejected settlement. One month later, on November 24, 1986, Dr. Kimbell was granted a discharge order in bankruptcy court, shielding him from any personal liability for claims pending against him as of the date of his bankruptcy filing. During all of this time, St. Paul was researching the question of whether or not Dr. Kimbell's

bankruptcy would impact the company's exposure to a potential bad faith suit by Mrs. Camp.

On April 13, 1987, the bankruptcy court modified the stay in Dr. Kimbell's case so as to allow Camp to liquidate her claim against the doctor. However, the bankruptcy court specifically ruled that any judgment obtained by Camp in her state court lawsuit would not be enforceable against Dr. Kimbell personally. In May 1987, St. Paul rejected a fourth offer by Camp to settle for the $250,000 policy limits. Although after this fourth rejection St. Paul offered to settle for amounts lower than the policy limits, the parties could not agree and Camp's case proceeded to trial. Mrs. Camp won a verdict of more than three million dollars on June 25, 1987. This judgment was affirmed on appeal. *Kimbell v. Camp*, 532 So.2d 1061 (Fla.Dist.Ct. App.1988) (table).

Subsequent to the verdict, the bankruptcy court in December of 1988 entered an order allowing the excess of the judgment as a general, non-priority unsecured claim against Dr. Kimbell's bankruptcy estate. Once again, the bankruptcy court stated that Camp's judgment could not be enforced against Dr. Kimbell personally. In the Florida state trial court, Dr. Kimbell moved for an order canceling and discharging the three million dollar judgment pursuant to Fla.Stat. ch. 55.145 (1991). On January 11, 1989, the lower state court discharged the judgment against Dr. Kimbell in accordance with this provision of Florida law.

B. *Procedural Background of the Bad Faith Lawsuit*

On February 3, 1989, the bad faith lawsuit filed by Camp and Venn at the end of 1988--the lawsuit that is the subject of this appeal--was removed to the United States District Court for the Northern District of Florida. After discovery, the parties briefed and argued cross-motions for summary judgment. St. Paul's motion for summary judgment relied heavily upon *Fidelity and Casualty Co. v. Cope*, 462 So.2d 459 (Fla.1985), and *Clement v. Prudential Property & Casualty Ins. Co.*, 790 F.2d 1545 (11th Cir.1986) (interpreting Florida law).

According to St. Paul, *Cope* and *Clement* make it clear that the essence of an insurance bad faith claim in Florida is *the named*

insured's liability for an excess judgment following the insurance company's bad faith failure to settle. The reason that some extant exposure to liability in the *insured* is the *sine qua non* of a Florida bad faith claim, St. Paul contended, is that the insurer's duty runs to the *insured,* not to any injured third party. In *Cope* and *Clement,* the named insured was not responsible for an excess verdict, because either the injured third party executed a release of his claims against the named insured (*Cope*) or agreed not to execute on the assets of the named insured (*Clement*). Both cases held that the injured party could not sue the insurance company for bad faith under Florida law, because the named insured had not been harmed by an enforceable excess judgment. *See Cope,* 462 So.2d at 459,461; *Clement,* 790 F.2d at 1547-48. Evidently, an insurance company's bad faith liability is extinguished once an insured is released from liability for a judgment in favor of an injured third party.

St. Paul contended that *Cope* and *Clement* required dismissal of the plaintiffs' bad faith claim in this case. Because Dr. Kimbell received his discharge in bankruptcy well before Camp's state court lawsuit proceeded to trial, the doctor was never liable for the adverse judgment in favor of Mrs. Camp. Moreover, the judgment rendered against Dr. Kimbell was subsequently canceled and discharged by the Florida circuit court, a discharge which had "the same effect as a satisfaction of judgment." Fla. Stat. ch. 55.145 (1991). Accordingly, St. Paul argued that under *Cope* and *Clement,* it could not be sued by Mrs. Camp or Mr. Venn for bad faith because its named insured was never liable for an excess verdict.

In their motion for summary judgment, the plaintiffs first relied upon the language of Dr. Kimbell's insurance policy. In particular, the plaintiffs asserted that the doctor's policy stated that St. Paul would "still be obligated under th[e] policy" if Dr. Kimbell went bankrupt or became insolvent. Therefore, they argued, even if *Cope* and *Clement* accurately stated that Florida law precluded bad faith claims when the named insured was not responsible for an excess judgment, the language of the St. Paul policy (which must be construed against the company) overrode that common law and permitted the plaintiffs' bad faith action against St. Paul. In short, the plaintiffs believed that St. Paul was "still ... obligated" to settle Camp's claim in good faith notwithstanding the bankruptcy of Dr. Kimbell.

The plaintiffs also argued that even if the language of the policy failed to authorize their bad faith suit against St. Paul, *Cope* and *Clement* should not be applied to bar their cause of action merely because of Dr. Kimbell's fortuitous bankruptcy. In essence, the plaintiffs claimed that *Cope* and *Clement* are distinguishable. First, neither case involved the bankruptcy of the named insured. Instead, in both cases the named insured was voluntarily released from liability for the excess judgment by the injured third party. Second, in neither *Cope* nor *Clement* were there any other adverse consequences to the named insured from the alleged bad faith of the insurance company. Here, in contrast, there may be other adverse consequences to Dr. Kimbell, in so far as his bankruptcy estate remains liable for the excess judgment. Finally, the plaintiffs argued, importing *Cope* and *Clement* wholesale into the bankruptcy context would be ill-advised. Under a regime in which a named insured's bankruptcy insulated all bad faith exposure, insurance companies might have an incentive to contribute to the named insured's bankruptcy, or might refuse to settle clearly legitimate claims if the named insured's bankruptcy was imminent or even possible.

Although the district court found that there were questions of fact regarding St. Paul's alleged bad faith failure to settle, the court agreed with St. Paul's legal analysis and accordingly awarded the insurer summary judgment. The court wrote:

> [T]he insurer's duty of good faith runs to the insured alone, as the *Cope* opinion makes very clear. As the Supreme Court of Florida indicated, the bankruptcy estate's cause of action is entirely derivative of the insured's, and is extinguished once the insured is released from obligations stemming from the underlying judgment. The underlying judgment could not be more clear: Kimbell was never personally liable for the excess judgment. Under the law of Florida, his discharge in bankruptcy had the effect of "satisfying" that judgment with respect to him. Further, the discharge was well before trial and long before judgment was entered. As the bankruptcy judge's order makes perfectly plain ..., any judgment in the *Camp* litigation "shall not be enforceable against the Debtor as a personal liability." Therefore, Kimbell was, before trial, "released from liability for any damages he might have suffered as a result of the insurer's bad faith." *See Clement, supra,* 790 F.2d at 1548. As a result, *Cope*

and *Clement* control, and St. Paul cannot be liable for any alleged bad faith in defending Dr. Kimbell.

Camp, 127 B.R. at 883-84. As for the specific bankruptcy language of Dr. Kimbell's policy, the court believed that the clause either "[did] not affect the application of the law of Florida and the particular way the judgment was entered in accordance with that law" or only referred to "St. Paul's duty to defend Kimbell and to pay off its claim up to the policy limits...." *Id.* at 885.

The plaintiffs appealed from the district court's order granting St. Paul summary judgment. On appeal, the parties have pressed the same arguments considered by the district court.

II. REASONS FOR CERTIFICATION

This case obviously involves important questions of unresolved Florida law. *Cope* appears to have relevance, but is not directly on point because it did not involve the bankruptcy of the named insured. Moreover, there may be indications that the lower Florida courts are retreating from the rationale of *Cope*. *See, e.g., Shook v. Allstate Ins. Co.*, 498 So.2d 498, 499-500 (Fla.Dist.Ct.App.1986) (distinguishing *Cope* and allowing the bad faith suit even though the named insured had been released from liability by the injured third party's agreement not to execute), *review denied*, 508 So.2d 13 (Fla.1987); *Clauss v. Fortune Ins. Co.*, 523 So.2d 1177, 1178 & n.3 (Fla.Dist.Ct.App.1988) (allowing, without discussion, injured party's bad faith claim despite the prior bankruptcy of the named insured).

As for the question of the language of Dr. Kimbell's insurance policy, Florida has never addressed the issue. Although it is unclear whether the bankruptcy clause in Dr. Kimbell's policy will overcome the principle clearly articulated in *Cope*, we note that other jurisdictions have shown some willingness to allow bad faith suits when the insurance policy contained similar language. *See, e.g., Ganaway v. Shelter Mut. Ins. Co.*, 795 S.W.2d 554, 563-64 (Mo.Ct.App.1990) (Missouri law) (permitting bad faith claim despite named insured's bankruptcy because the "policy contained a provision that bankruptcy or insolvency of the insured or his estate would not relieve [the company] of any obligation"); *Torrez v. State Farm Mut. Auto. Ins. Co.*, 705 F.2d 1192, 1197-1201 (10th Cir.1982)

(New Mexico law) (permitting the bad faith claim despite bankruptcy); *Maguire v. Allstate Ins. Co.*, 341 F.Supp. 866, 869-71 (D.Del.1972)(Delaware law)(same). *But see Harris v. Standard Accident and Ins. Co.*, 297 F.2d 627, 636 (2d Cir.1961)(New York law)(barring bad faith claim, without regard to insurance policy language, because the named insureds "were insolvent before the excess judgment was rendered, have not paid any part of it, and have been discharged from any future obligation to pay it"), *cert. denied*, 369 U.S. 843, 82 S.Ct. 875, 7 L.Ed.2d 847 (1962).

Accordingly, because of the novelty and importance of the issues raised in this appeal, we certify the following two questions to the Florida Supreme Court.

III. QUESTIONS TO BE CERTIFIED

(1) WHETHER, AS A MATTER OF LAW, A NAMED INSURED'S BANKRUPTCY AND DISCHARGE FROM LIABILITY PRIOR TO EXPOSURE TO AN EXCESS JUDGMENT, SUCH THAT THE NAMED INSURED WAS NEVER PERSONALLY LIABLE FOR ANY AMOUNT OF THE JUDGMENT, PRECLUDES AN INJURED PARTY'S OR BANKRUPTCY TRUSTEE'S SUBSEQUENT BAD FAITH CAUSE OF ACTION AGAINST AN INSURANCE COMPANY.

(2) WHETHER, AS A MATTER OF LAW, THE LANGUAGE OF A BANKRUPTCY CLAUSE IN A PARTICULAR INSURANCE POLICY, SUCH AS THE LANGUAGE AT ISSUE IN THIS CASE, CAN AUTHORIZE AN INJURED PARTY'S OR BANKRUPTCY TRUSTEE'S BAD FAITH ACTION AGAINST AN INSURANCE COMPANY, NOTWITHSTANDING THE FACT THAT THE NAMED INSURED WAS NEVER PERSONALLY LIABLE FOR ANY AMOUNT OF AN EXCESS JUDGMENT DUE TO THE NAMED INSURED'S BANKRUPTCY.

We do not intend the particular phrasing of these questions to limit the Florida Supreme Court in its consideration of the problems posed by this entire case. In answering the certified questions, the Florida Supreme Court may wish to consider whether or not different answers would be appropriate if the evidence demonstrated that the conduct of the insurance company either caused or

contributed to the named insured's bankruptcy. In addition, the proper resolution of the certified questions may require an interpretation of Fla.Stat.ch. 624.155 (1991). The plaintiffs have contended that because this chapter authorizes "[a]ny person" to bring a bad faith action against an insurance company, *id.* ch. 624.155(1), Mrs. Camp's lawsuit is not derivative of Dr. Kimbell's right of action and therefore not dependent upon his prior exposure to liability. In order to assist consideration of the case, the entire record, along with the briefs of the parties, shall be transmitted to the Supreme Court of Florida together with this certification.

QUESTIONS CERTIFIED.

APPENDIX C

SUPREME COURT OF FLORIDA

No. 79712

ANNA RUE CAMP, ET AL.
Plaintiffs-Appellants

v.

ST. PAUL FIRE & MARINE
INSURANCE COMPANY
Defendant-Appellee

[February 4, 1993]

Rehearing Denied April 13, 1993

MCDONALD, Justice.

In *Camp v. St. Paul Fire & Marine Insurance Co.*, 958 F.2d 340, 344 (11th Cir.1992), the United States Court of Appeals for the Eleventh Circuit certified the following questions of law:

> (1) WHETHER, AS A MATTER OF LAW, A NAMED INSURED'S BANKRUPTCY AND DISCHARGE FROM LIABILITY PRIOR TO EXPOSURE TO AN EXCESS JUDGMENT, SUCH THAT THE NAMED INSURED WAS NEVER PERSONALLY LIABLE FOR ANY AMOUNT OF THE JUDGMENT, PRECLUDES AN INJURED PARTY'S OR BANKRUPTCY TRUSTEE'S SUBSEQUENT BAD FAITH CAUSE OF ACTION AGAINST AN INSURANCE COMPANY.

(2) WHETHER, AS A MATTER OF LAW, THE LANGUAGE OF A BANKRUPTCY CLAUSE IN A PARTICULAR INSURANCE POLICY, SUCH AS THE LANGUAGE AT ISSUE IN THIS CASE, CAN AUTHORIZE AN INJURED PARTY'S OR BANKRUPTCY TRUSTEE'S BAD FAITH ACTION AGAINST AN INSURANCE COMPANY, NOTWITHSTANDING THE FACT THAT THE NAMED INSURED WAS NEVER PERSONALLY LIABLE FOR ANY AMOUNT OF AN EXCESS JUDGMENT DUE TO THE NAMED INSURED'S BANKRUPTCY.

We have jurisdiction pursuant to article V, section 3(b)(6) of the Florida Constitution. We conclude that a named insured's bankruptcy does not bar a bad faith action by the bankruptcy trustee.

This case arose out of a medical malpractice suit filed in late 1984 by Anna Rue Camp, the injured party, against Dr. Fariss Kimbell, the insured. St. Paul Fire and Marine Insurance Company issued a medical malpractice insurance policy to Dr. Kimbell with a policy limit of $250,000 per person injured. The policy contained the following language:

> Once liability has been determined by judgement or by written agreement, the party making the claim may be able to recover under this policy, up to the limits of your coverage. But that party can't sue us directly or join us in a suit against the protected person until liability has been so determined. If the protected person or his or her estate goes bankrupt or becomes insolvent, we'li still be obligated under this policy.

In July 1986, Dr. Kimbell filed a Chapter 7 bankruptcy case in the United States Bankruptcy Court for the Northern District of Florida. Subsequently, Mrs. Camp's state lawsuit was halted pursuant to the automatic stay required by 11 U.S.C. § 362 (1988).

Between the time that Mrs. Camp filed her malpractice suit in 1984 and the time that Dr. Kimbell filed his bankruptcy case in 1986, Mrs. Camp twice offered to settle with St. Paul for Dr. Kimbell's policy limits. Although St. Paul was aware of Dr. Kimbell's deteriorating financial position, it rejected both of Mrs. Camp's settlement offers. On September 19, 1986, after Dr. Kimbell actually

filed for bankruptcy, St. Paul refused Mrs. Camp's third offer to settle.

The bankruptcy court granted a discharge order on November 26, 1986 that shielded Dr. Kimbell from any personal liability for claims pending against him as of the date of his bankruptcy filing. In April 1987, the bankruptcy court authorized Mrs. Camp to proceed with her suit for the purpose of liquidating her claim in the bankruptcy case. At the same time, however, the bankruptcy court specifically ruled that Dr. Kimbell would be not personally liable for any judgment Mrs. Camp obtained against him in her state court lawsuit.

In May 1987, Mrs. Camp tendered her fourth offer to settle for the policy limits, but St. Paul agreed to settle only for an amount lower than the $250,000 policy limit. When the settlement negotiations failed, the case proceeded to trial and the jury returned a verdict in Mrs. Camp's favor for more than three million dollars.[1] The bankruptcy court issued an order that allowed the excess judgment to be classified as a general, non-priority unsecured claim against Dr. Kimbell's bankruptcy estate. Pursuant to section 55.145, Florida Statutes (1991),[2] the state trial court granted Dr. Kimbell's motion for an order canceling and discharging the three-million-dollar judgment against him.

Mrs. Camp and Dr. Kimbell's bankruptcy trustee, John Venn, filed a bad faith action against St. Paul in state court, alleging that

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[1] The judgment against Dr. Kimbell was affirmed on appeal. *Kimbell v. Camp*, 532 So.2d 1061 (Fla.1st DCA 1988).

[2] This section provides in pertinent part as follows:

> At any time after 1 year has elapsed since a bankrupt or debtor was discharged from his debts, pursuant to the act of congress relating to bankruptcy, the bankrupt or debtor, his receiver or trustee, or any interested party may petition the court in which the judgment was entered against such bankrupt or debtor for an order to cancel and discharge such judgment.... If it appears upon the hearing that the bankrupt or debtor has been discharged from the payment of that judgment or of the debt upon which it was recovered, the court shall enter an order canceling and discharging said judgment. The order of cancellation and discharge shall have the same effect as a satisfaction of judgment....

St. Paul failed in its obligation to settle the medical malpractice claim in good faith. The bad faith suit was ultimately removed to the United States District Court for the Northern District of Florida, and the district court granted summary judgment in favor of St. Paul. On appeal the United States Court of Appeals for the Eleventh Circuit found that this case involved issues of first impression under Florida law and, therefore, certified the questions now before us.

An insurer who assumes the defense of the insured also assumes a duty to act in good faith and with due regard to the interests of the insured. *Boston Old Colony Ins. Co. v. Gutierrez*, 386 So.2d 783 (Fla.1980). More specifically, in actions by third parties against the insured, the insurer must act in good faith and be diligent in its effort to negotiate a settlement. *Auto Mutual Indemnity Co. v. Shaw*, 184 Fla. 815, 184 So. 852 (1938). The insurer breaches its duty if it fails to act in good faith and the third party obtains a judgment against the insured for an amount in excess of the policy coverage. *Id.*

In the instant case, St. Paul contends that its alleged bad faith liability is extinguished because Dr. Kimbell was never harmed by or liable for the excess verdict. According to St. Paul, Dr. Kimbell was not affected by the excess judgment for two reasons. First, Dr. Kimbell received his discharge in bankruptcy before Camp's state court lawsuit ever proceeded to trial and, consequently, he was never liable for the adverse judgment in favor of Mrs. Camp. Second, the court canceled and discharged the judgment rendered against Dr. Kimbell pursuant to section 55.145.

St. Paul relies heavily on *Fidelity & Casualty Co. v. Cope*, 462 So.2d 459 (Fla.1985), to support its argument that Dr. Kimbell was not personally harmed by the excess judgment.[3] In *Cope*, we held that,

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[3] In *Fidelity and Casualty Co. v. Cope*, 462 So.2d 459 (Fla.1985). Mrs. Cope was the passenger in a car driven by Ms. Gehan, who was insured by Hartford Accident and Indemnity Company. Mrs. Cope was killed when her car collided with a car driven by Mr. Brosnan, who was insured by Fidelity and Casualty Company of New York. Cope filed suit against Hartford based upon its bad faith failure to settle. Hartford settled the bad faith action for $50,000 in return for Cope's execution of a release and satisfaction of judgment in favor of Hartford, Gehan, and Brosnan. Fidelity was not named in the release. Cope

if an excess judgment has been satisfied, absent an assignment of that cause of action prior to satisfaction, a third party cannot maintain an action for a breach of duty between an insurer and its insured. The release executed in *Cope* eliminated the harm that resulted from the excess judgment. In the instant case, however, there was no such release that eliminated the harm done to Dr. Kimbell's estate by St. Paul's failure to settle in good faith. Because St. Paul's duty extended to the bankruptcy estate and the estate was damaged by St. Paul's failure to settle within the policy limits, St. Paul's argument is flawed.

Under federal bankruptcy law, the bankruptcy estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. §541(a)(1). Thus, in the instant case, the bankruptcy estate holds Dr. Kimbell's insurance policy as an asset because it was an interest of the debtor when the bankruptcy suit was filed in July 1986. The bankruptcy estate stood in the shoes of the debtor and, in effect, the estate became the insured. "[W]hatever claim--*including potential and contingent claims*--that the bankrupt owns at the time of his petition becomes a part of his estate, with the title thereto vested in the trustee." *Palmer v. Travelers Ins. Co.*, 319 F.2d 296, 299-300 (5th Cir.1963)(emphasis added). We also note that Dr. Kimbell's liability policy with St. Paul included the following statement: "If the protected person or his or her estate goes bankrupt or becomes insolvent, we'll still be obligated under this policy." The language of the policy affirms that, even if the insured filed bankruptcy, St. Paul would bear the duty to defend and pay off a claim up to the policy limits. St. Paul thus assumed a duty to the bankruptcy estate. It knew, or should have known, that its failure to settle a claim within the policy limits could affect the bankruptcy estate. Accordingly, the bankruptcy trustee, as holder of the policy, would have any cause of action that any insured would have had.

The excess judgment against Dr. Kimbell harmed his bankruptcy estate by increasing the debt of the estate to the detriment of its

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thereafter filed suit against Fidelity for the $30,000 which remained unpaid on the judgment. Because Cope's excess judgment had been satisfied, we held that her estate could not bring a bad faith action against Fidelity.

creditors. The estate was damaged by the addition of Mrs. Camp as an additional unsecured creditor, a result that could have been avoided if St. Paul had settled her claim. As the trustee of the bankruptcy estate, Mr. Venn acted properly in filing a bad faith action to recoup the excess judgment for which the estate remains liable.

Therefore, as explained above, we determine that an action for bad faith may be claimed by the trustee of Kimbell's bankruptcy estate against St. Paul. We return the proceedings to the United States Court of Appeals for the Eleventh Circuit.

It is so ordered.

BARKETT, C.J., and OVERTON, SHAW, GRIMES, KOGAN and HARDING, JJ., concur.

APPENDIX D

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

No. 91-3213

ANNA RUE CAMP AND JOHN E. VENN,
AS TRUSTEE OF THE ESTATE OF
FARISS D. KIMBELL, JR., M.D.
Plaintiffs-Appellants

v.

ST. PAUL FIRE & MARINE
INSURANCE COMPANY
Defendant-Appellee

[April 22, 1993]

Before KRAVITCH, ANDERSON and BIRCH, Circuit Judges.

BIRCH, Circuit Judge:

On April 16, 1992, we issued an opinion in this case in which we requested the Florida Supreme Court's assistance with respect to a certified question concerning the intersection of insurance bad faith law and bankruptcy law. *See* 958 F.2d 340 (11th Cir.1992). The Florida Supreme Court answered the question by holding that a bankruptcy trustee may bring an action against the bankrupt's insurance company for the bad faith failure to settle a claim. *See* No. 79,712, —- So.2d —-, 1993 WL 25140, 1993 Fla. LEXIS 178 (Fla.

February 4, 1993). This holding was contrary to the district court's decision.

We note, however, that the district court properly dismissed Anna Rue Camp, a judgment creditor of the bankruptcy estate, as a plaintiff in this case. 127 B.R. 879. The Florida Supreme Court held that the bankruptcy trustee, John E. Venn, can maintain an action against the insurer because the bankruptcy estate "stood in the shoes of the debtor and, in effect, the estate became the insured." St. Paul's duty to act in good faith, thus, only ran to the bankruptcy estate, and Camp may not maintain an action against St. Paul for bad faith. In fact, it strains logic to understand why Camp, who received a judgment approximately $2.75 million above the policy limits in her separate medical malpractice action, was damaged by St. Paul's alleged bad faith refusal to settle within the policy limits in that case.

Therefore, the district court's opinion is AFFIRMED in part, REVERSED in part and REMANDED for further proceedings consistent with this opinion and that of the Florida Supreme Court.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

N. 91-3213

ANNA RUE CAMP and JOHN E. VENN,
as Trustee of the Estate of
FARISS D. KIMBELL, JR., M.D.,

Plaintiffs-Appellants,

versus

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY,

Defendant-Appellee.

On Appeal from the United States District Court
for the Northern District of Florida

[Entered June 18, 1993]

ON PETITION(S) FOR REHEARING AND SUGGESTION(S)
OF REHEARING EN BANC

Before: KRAVITCH, ANDERSON and BIRCH, Circuit Judges

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court

having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

S\ STANLEY F. BIRCH, JR.
UNITED STATES CIRCUIT JUDGE

APPENDIX F

5. 11 U.S.C. § 330(b) provides in pertinent part:

> (b) There shall be paid from the filing fee in a case under chapter 7 of this title, $45 to the trustee serving in such case, after such trustee's services are rendered.

6. 11 U.S.C. § 362 provides in pertinent part:

> Automatic stay
>
> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of --
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

7. 11 U.S.C. § 501 provides in pertinent part:

> Filing of proofs of claims or interests
>
> (a) A creditor or an indenture trustee may file a proof of claim. An equity security holder may file a proof of claim.

8. 11 U.S.C. § 541 provides in pertinent part:

> Property of the Estate
>
> (a) The commencement of a case under section 301, 302, or 303 of this title creates an estate.

Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

* * *

(5) Any interest in property that would have been property of the estate if such interest had been an interest of the debtor on the date of the filing of the petition, and that the debtor acquires or becomes entitled to acquire within 180 days after such date --

(A) by bequest, devise, or inheritance;

(B) as a result of a property settlement agreement with the debtor's spouse, or of an interlocutory or final divorce decree; or

(C) as a beneficiary of a life insurance policy or of a death benefit plan.

* * *

(b) Property of the estate does not include--

(1) any power that the debtor may exercise solely for the benefit of an entity other than the debtor....

9. 11 U.S.C. § 727 provides in pertinent part:

Discharge

(a) The court shall grant the debtor a discharge, unless--

(1) the debtor is not an individual;

* * *

(b) Except as provided in section 523 of this title, a discharge under subsection (a) of this section discharges the debtor from all debts that arose before the date of the order for relief under this chapter, and any liability on a claim that is determined under section 502 of this title as if such claim had arisen before the commencement of the case, whether or not a proof of claim based on any such debt or liability is filed under section 501 of this title, and whether or not a claim based on any such debt or liability is allowed under section 502 of this title.

10. Section 55.145, *Florida Statutes* (1985) provides in pertinent part:

> If it appears...that the bankruptcy or debtor has been discharged...the Court shall enter an order canceling and discharging said judgment. The order of cancellation and discharge shall have the same effect as a satisfaction of judgment...

11. Rule 9019(a), Federal Rules of Bankruptcy Procedure:

Compromise and Arbitration

(a) COMPROMISE. On motion by the trustee and after a hearing on notice to creditors, the United States trustee, the debtor and indenture trustees as provided in Rule 2002 and to such other entities as the court may designate, the court may approve a compromise or settlement.

Supreme Court, U.S.
FILED
OCT 13 1993
OFFICE OF THE CLERK

No. 93-435

In The

Supreme Court of the United States

October Term, 1993

ST. PAUL FIRE & MARINE INSURANCE CO.,

Petitioner,

vs.

ANNA RUE CAMP and JOHN E. VENN, as Trustee of the Estate of Farris D. Kimbell, Jr., M.D.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BEST AVAILABLE COPY

QUESTIONS PRESENTED (AS REPHRASED)

1. Whether any federal question is presented by the Florida Supreme Court's holding that under Florida law an action for bad faith failure to settle can be brought against a liability insurer by the insured's bankruptcy estate, which is liable for an excess judgment rendered against the insured.

2. Whether a cause of action against a liability insurer for bad faith failure to settle a claim against an insured who becomes bankrupt is property of the bankruptcy estate under 11 U.S.C. § 541(a)(1) or § 541(a)(7).

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4 *Collier on Bankruptcy* ¶ 541 (1993) 10, 11

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the statutes cited by petitioner St. Paul Fire and Marine Insurance Company, respondent John E. Venn believes that 11 U.S.C. § 541(a)(7) and Article V, § 3(b)(6) of the Florida Constitution are involved in this case.

The full text of 11 U.S.C. § 541(a)(7) reads as follows:

> **Property of the Estate**
>
> (a) The commencement of a case under Section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property:
>
> * * *
>
> (7) Any interest in property that the estate acquires after the commencement of the case.

Article V, § 3(b)(6) of the Florida Constitution provides:

> **Supreme Court**
>
> * * *
>
> (b) **Jurisdiction**: The Supreme Court:
>
> * * *
>
> (6) may review a question of law certified by the Supreme Court of the United States or a United States Court of Appeals which is determinative of the cause and for which there is no controlling precedent of the Supreme Court of Florida.

STATEMENT OF THE CASE

In 1983, Dr. Farris Kimbell, a Florida neurosurgeon, negligently and unnecessarily performed brain surgery on Anna Rue Camp. As a result of Dr. Kimbell's negligence, Mrs. Camp suffered severe damages. When Dr. Kimbell's liability insurer, St. Paul Fire & Marine Insurance Company, refused to settle Mr. Camp's claim for the $250,000 policy limits, Mrs. Camp sued Dr. Kimbell. During the course of the litigation, St. Paul on several occasions rejected Mrs. Camp's offers to settle for the policy limits. Dr. Kimbell also filed for bankruptcy while the litigation was pending. The case went to trial and Mrs. Camp received a judgment of over $3,000,000. After an unsuccessful appeal, St. Paul paid Mrs. Camp $250,000 under the policy. *See* App. 17a-19a, 26a-27a.

Although Dr. Kimbell was relieved of any personal responsibility for the judgment in excess of the policy limits (the "excess judgment"), the judgment became a "general, non-priority unsecured claim against Dr. Kimbell's bankruptcy estate." App. 19a. This case is an action against St. Paul brought by John Venn, the trustee of Dr. Kimbell's bankruptcy estate, for bad faith failure to settle Mrs. Camp's claim. Mr. Venn seeks to recover the excess judgment for which the estate is liable.

St. Paul's statement of the case is generally correct with respect to the case's procedural history, but it contains various factual statements – e.g., that St. Paul's bad faith did not contribute to Dr. Kimbell's bankruptcy, Pet. 3 n.4 & 9 n.9, and that St. Paul's only acts of bad faith occurred, if at all, after Dr. Kimbell filed for bankruptcy, Pet. 9. n.19 – that are either wholly erroneous or remain

for disposition at trial given the reversal of the district court's grant of summary judgment in favor of St. Paul.

For example, St. Paul's assertion that it acted in bad faith, if at all, only after the bankruptcy flies in the face of evidence that St. Paul committed many acts of bad faith prior to the bankruptcy. St. Paul refused to settle the claim even though it was told that Dr. Kimbell might have to file for bankruptcy if the case were not settled, R. IV:141, Exhibit 16; knew that its own experts questioned Dr. Kimbell's surgical technique, *id.* at Exhibit 21; twice ignored the recommendation of the attorney it hired to represent Dr. Kimbell that it should settle for the policy limits, *id.* at Exhibits 22 and 43; knew that independent neurosurgeons had concluded that Dr. Kimbell had been negligent, *id.* at Exhibits 32 and 38; knew that Mrs. Camp continued to deteriorate, *id.* at Exhibit 34; and could not find a "heavy hitter" expert to back up Dr. Kimbell's surgery, *id.* at Exhibit 41. In addition, St. Paul did not discuss the advantages or disadvantages of settlement with Dr. Kimbell. R. V:145. Thus, the premise for the first question presented in St. Paul's Petition – that all of the wrongful conduct took place after the bankruptcy – is not supported by the record. St. Paul cannot say conclusively that its version of the facts is the only conceivable version that a jury must accept.

St. Paul's statement of the case also omits significant facts. St. Paul fails to mention that the excess judgment rendered against Dr. Kimbell was allowed "as a general non-priority unsecured claim against Dr. Kimbell's bankruptcy estate." App. 19a, 27a. This liability was the basis for the Florida Supreme Court's conclusion that under state law the bankruptcy estate had been harmed by the

excess judgment. *See* App. 29a-30a. St. Paul also omits any reference to the bankruptcy clause in Dr. Kimbell's policy, which provided that St. Paul would still be "obligated" under the policy if Dr. Kimbell became bankrupt. App. 26a. The Florida Supreme Court ruled that the bad faith action against St. Paul could proceed as a result of this policy language. *See* App. 29a.

Mr. Venn submits that the procedural history and facts are accurately set forth in the opinions of the Eleventh Circuit, App. 17a-22a, and the Florida Supreme Court, App. 26a-28a, and directs the Court to those opinions. In the body of this Response, Mr. Venn will discuss the facts as relevant to the legal issues presented.

REASONS WHY THE WRIT SHOULD BE DENIED

St. Paul seeks review of the Eleventh Circuit's interlocutory opinion reversing the district court's grant of summary judgment – based on the Florida Supreme Court's resolution of certified questions – and remanding for a trial on Mr. Venn's state-law bad faith claim. As there has not yet been a trial, numerous factual matters regarding the bad faith claim against St. Paul remain unresolved. Without resolution of these matters the Court may not be able to reach the questions presented by this Petition even if it should be inclined to grant review.

This Court's "normal practice" is to "deny[ ] interlocutory review." *Estelle v. Gamble*, 429 U.S. 97, 114 (1976) (Stevens, J., dissenting). "[E]xcept in extraordinary cases, the writ is not issued until final decree." *Hamilton Brown Shoe Co. v. Wolf. Bros. & Co.*, 240 U.S. 251, 258 (1916).

Because the lack of a final judgment "of itself alone" furnishes "sufficient ground for the denial" of a petition for certiorari, *id.*, the Court should deny St. Paul's Petition to review the interlocutory judgment rendered by the Eleventh Circuit.

Aside from the interlocutory nature of the Eleventh Circuit's judgment, many reasons support denial of the Petition, including the adequate and independent state grounds supporting the decisions below, the lack of any conflict among the federal and state courts as to whether liability policies and any bad faith actions arising from them constitute property of the bankruptcy estate, and St. Paul's complete change of legal position on appeal as to whether the bad faith action is property of the bankruptcy estate. These reasons, addressed more fully below, demonstrate that there are no "special and important reasons" for granting the Petition. *See* S.Ct. Rule 10.1.

I. THE HOLDINGS OF THE FLORIDA SUPREME COURT AND THE ELEVENTH CIRCUIT THAT ST. PAUL COULD BE SUED FOR BAD FAITH ARE BASED ON ADEQUATE AND INDEPENDENT STATE GROUNDS

This case is a bad faith action under Florida law against St. Paul for failure to settle a medical malpractice claim against its insured, Dr. Kimbell; it does not, as St. Paul suggests, involve a claim in bankruptcy arising under federal law. Indeed, because the complaint did not raise any federal issues, St. Paul removed the case from Florida circuit court to federal district court only on diversity grounds. Pet. 4 n.7; R.1:2.

The Florida Supreme Court held that Dr. Kimbell's bankruptcy estate was harmed when the excess judgment was declared a claim against the estate, and that this harm was sufficient to permit a bad faith action by Mr. Venn against St. Paul. App. 29a-30a. St. Paul seems to argue in its Petition that the question of "harm" suffered by the bankruptcy estate as a result of the excess judgment is a question of federal law, Pet. 13, but this contention is meritless. The "determination of property rights in the assets of a bankrupt's estate" is a matter of "state law. Property interests are created and defined by state law." *Butner v. United States*, 440 U.S. 48, 54-55 (1979). Indeed, the only case that St. Paul cites in support of its contention is a case in which the Second Circuit interpreted New York bad faith law and did not decide any federal issues. *See Harris v. Standard Accident & Ins. Co.*, 297 F.2d 627, 630 (2d Cir. 1961) ("The plaintiff has failed to prove any damage whatever *under New York law*.") (emphasis added), *cert. denied*, 369 U.S. 843 (1962).[1]

The procedural history of the case also shows that the decisions below with respect to the existence of a cause of action are based on adequate and independent state grounds. In the district court, St. Paul, relying on *Fidelity & Casualty Co. v. Cope*, 462 So.2d 459 (Fla. 1985), argued that no cause of action for bad faith existed under Florida

---

[1] St. Paul correctly argues that 11 U.S.C. § 541(a)(1) does not "create any new cause of action" for bad faith. Pet. 11. But neither of the decisions below based the cause of action on § 541(a)(1), so St. Paul's argument misses the point. As explained in the text, it is Florida law that creates the cause of action for bad faith. Thus, the third question presented in St. Paul's Petition is illusory.

law because Dr. Kimbell's bankruptcy discharge eliminated any "harm" resulting from St. Paul's conduct. R. II:106.[2] The district court granted summary judgment in favor of St. Paul on the state law ground urged by St. Paul, i.e., that under Florida law no action for bad faith could lie because Dr. Kimbell, as a result of his bankruptcy discharge, had not been "harmed" by St. Paul's conduct. App. 5a-14a. In the district court's view, the "unique and interesting issue" in the case was "whether Dr. Kimbell's discharge in bankruptcy prior to trial relieve[d] St. Paul of any potential liability *under the law of Florida*." App. 5a (emphasis added).

Consistent with the district court's understanding, the Eleventh Circuit found that the case "raise[d] issues of first impression *under Florida law*," and therefore certified various questions of state law to the Florida Supreme Court. App. 17a, 23a-24a (emphasis added). The Florida Supreme Court would not have had jurisdiction to answer the certified questions if the questions presented issues of federal law. *See* Fla. Const. Art. V, § 3(b)(6).

The Eleventh Circuit asked the Florida Supreme Court to decide whether under Florida law an insured's bankruptcy precluded a bad faith action against the insurer. App. 23a-24a. The Florida Supreme Court held that Mr. Venn, as Dr. Kimbell's bankruptcy trustee, could sue St. Paul for bad faith failure to settle a claim against Dr. Kimbell. App. 29a-30a. The Florida Supreme Court

---

[2] In *Cope*, the Florida Supreme Court held that a bad faith action does not survive the receipt of a general release by the insured from the injured person. St. Paul has always maintained that a discharge in bankruptcy has the same effect as a release.

rejected St. Paul's argument that there had been no "harm" under its previous decision in *Cope*: "The excess judgment against Dr. Kimbell harmed his bankruptcy estate by increasing the debt of the estate to the detriment of its creditors. . . . As the trustee of the bankruptcy estate, Mr. Venn acted properly in filing a bad faith action to recoup the excess judgment for which the estate remains liable." *Id.*

So as to eliminate any doubt about the state-law moorings of its decision regarding the existence of a cause of action, the Florida Supreme Court also held that St. Paul could be sued for bad faith as a result of a bankruptcy clause in Dr. Kimbell's insurance policy:

> We also note that Dr. Kimbell's liability policy with St. Paul included the following statement: "If the protected person or his or her estate goes bankrupt or becomes insolvent, we'll still be obligated under this policy." The language of the policy affirms that, even if the insured filed bankruptcy, St. Paul would bear the duty to defend and pay off a claim up to the policy limits. St. Paul thus assumed a duty to the bankruptcy estate. It knew, or should have known, that its failure to settle a claim within the policy limits could affect the bankruptcy estate. Accordingly, the bankruptcy trustee, as holder of the policy, would have any cause of action that any insured would have had.

App. 29a.[3] This holding demonstrates that the decisions below concerning the existence of a cause of action for

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[3] Given this unequivocal holding, it is puzzling to see St. Paul contend that the Florida Supreme Court did not answer the certified question relating to the bankruptcy clause. Pet. 6.

bad faith are based on state law; under Florida law a bad faith action sounds in contract. *Shuster v. South Broward Hospital District*, 591 So.2d 174, 176 (Fla. 1992); *Nationwide Mutual Ins. Co. v. McNulty*, 229 So.2d 585, 586 (Fla. 1971).

In sum, the Florida Supreme Court and the Eleventh Circuit did no more than hold that St. Paul could be sued for its bad faith failure to settle notwithstanding the bankruptcy of its insured. This recognition of the existence of a cause of action is, plain and simple, a determination of state law.

II. FEDERAL AND STATE COURTS HAVE CONSISTENTLY HELD THAT A CAUSE OF ACTION AGAINST A BANKRUPT'S LIABILITY INSURER FOR BAD FAITH FAILURE TO SETTLE IS PROPERTY OF THE BANKRUPTCY ESTATE

The only possible federal issue decided by the Florida Supreme Court and the Eleventh Circuit was that the cause of action for bad faith was "property" of the bankruptcy estate. There is, however, no reason for this Court to grant certiorari on that issue; the decisions below followed a long and unbroken line of authority holding that causes of action for bad faith are "property" of the

---

Apparently St. Paul has chosen to ignore this language in the Florida Supreme Court's opinion, and has omitted any reference in its Petition to the bankruptcy clause. The omission may be due to the fact that the Florida Supreme Court's interpretation of the bankruptcy clause is consistent with the three other cases dealing with the issue. *See* App. 22a-23a (Eleventh Circuit opinion citing cases).

bankruptcy estate and can be prosecuted by the bankruptcy trustee. Accordingly, there is no conflict to be resolved by this Court.[4]

Under 11 U.S.C. § 541(a)(1) a debtor's liability policy is property of the bankruptcy estate. *See generally In re Edgeworth*, 993 F.2d 51, 55-56 & n.13 (5th Cir. 1993) (citing cases); 4 *Collier on Bankruptcy* ¶ 541.10[5]-[6] & n.17, at 541-70 to 541-71 (1993). Because "[a]ny rights the debtor has against the insurer, whether contractual or otherwise, become property of the estate," *Edgeworth*, 993 F.2d at 55, federal and state courts have consistently held that a cause of action against a liability insurer for bad faith failure to settle is property of the bankruptcy estate and can be prosecuted by the trustee. *See Young v. American Cas. Co.*, 416 F.2d 906, 912 (2d Cir.), *cert. dismissed*, 396 U.S. 997 (1969); *Anderson v. St. Paul Mercury Indemn. Co.*, 340 F.2d 406, 409 (7th Cir. 1965); *Moore v. USF&G Ins. Co.*, 325 F.2d 972, 975 (10th Cir. 1963) (dicta); *Palmer v. Travelers Ins. Co.*, 319 F.2d 296, 299-300 (5th Cir. 1963); *Byrnes v. Phoenix Assur. Co.*, 178 F.Supp. 488, 489-91 (E.D. Wis. 1959); *Purdy v. Pacific Automobile Ins. Co.*, 157 Cal. App. 3d 59, 203 Cal. Rptr. 524, 531-32 (1984); *Wooten v. Central Mutual Ins. Co.*, 182 So.2d 146, 148 (La. App. 1966). *See also* 4 *Collier on Bankruptcy* ¶ 541.10[6] n.19, at 541-71 (1993) (citing *Palmer* and *Moore* as "cases concerned with an action for insurer's breach of duty"). These authorities – none of which are cited by St. Paul in its Petition – show

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[4] A "principal purpose" for exercise of this Court's certiorari jurisdiction is to resolve conflicts among the federal and state courts on matters of federal law. *Braxton v. United States*, 111 S.Ct. 1854, 1857 (1991).

that the decisions below did not create any conflict. Tellingly, St. Paul does not even argue that a conflict exists.[5]

St. Paul tries to dodge these authorities by saying that in this case the excess judgment was entered after Dr. Kimbell filed for bankruptcy and its wrongful conduct (if any) took place only after the bankruptcy. According to St. Paul, only causes of action that "accrue" prior to bankruptcy become property of the estate, and here the cause of action accrued only after the bankruptcy filing. Pet. 8-10.

Even if the predicate for St. Paul's "accrual" argument is accepted at face value,[6] the cause of action is

---

[5] St. Paul can only argue that the decisions below are the first of their kind involving a Chapter 7 bankruptcy. Pet. 8, 11. Even if St. Paul is correct, the nature of the bankruptcy is irrelevant to the bankruptcy question presented by St. Paul's Petition; § 541(a)(1) applies to Chapter 7 proceedings just as it applies to Chapter 11 proceedings. 4 *Collier on Bankruptcy* ¶ 541.01, at 541-5 (1993).

[6] Although under Florida law a cause of action for bad faith *accrues* upon the entry of an excess judgment, *Blanchard v. State Farm Mutual Automotive Ins. Co.*, 575 So.2d 1289, 1291 (Fla. 1991), accrual is not equated with the insurer's wrongful conduct. Many causes of action accrue after the tortfeasor's act. Similarly, the timing of the insurer's last rejection of a settlement offer does not fix the date of the insurer's bad faith behavior. "The lack of a formal offer to settle does not preclude a finding of bad faith. . . . Bad faith may be inferred from a delay in settlement negotiations which is willful and without reasonable cause." *Powell v. Prudential Property & Cas. Co.*, 584 So.2d 12, 14 (Fla. Dist. Ct. App. 1991). As explained earlier, there is ample evidence from which a jury could find that St. Paul acted in bad faith well before Dr. Kimbell's bankruptcy filing. *See supra* at 3.

property of the bankruptcy estate. This Court has recognized that § 541(a)(1), whose "scope is broad," *United States v. Whiting Pools, Inc.*, 462 U.S. 198, 205 (1983), brings into the bankruptcy estate causes of action which are contingent and which have not yet accrued. In *Segal v. Rochelle*, 382 U.S. 375 (1966), this Court unanimously held that under the predecessor to § 541(a)(1) a bankruptcy estate owned loss-carryback tax refund claims arising from losses in a tax year not yet completed when the debtors filed for bankruptcy. This Court rejected the argument of the debtors that the refunds belonged to them and not the estate because "under the statutory scheme no refund could be claimed . . . until the end of the year." *Id.* at 380. It explained that

> postponed enjoyment does not disqualify an interest as "property." That earnings by the bankrupt after filing the petition might diminish or eliminate the . . . refund claim does further qualify the interest, but we have already noted that contingency in the abstract is no bar and the actual risk that the refund claims may be erased is quite far from a certainty.

Id. Under the rationale of *Segal*, the cause of action for bad faith against St. Paul, even if contingent at the time of the bankruptcy filing, became property of Dr. Kimbell's bankruptcy estate under § 541(a)(1).

Contrary to St. Paul's assertion, the decisions below are consistent with the Fifth Circuit's decision in *Palmer v. Travelers Ins. Co.*, 319 F.2d 296 (5th Cir. 1963). In *Palmer*, an insurance company was sued by the insured's bankruptcy estate for bad faith. The insurance company argued that under Texas law the action for bad faith did

not accrue until the excess judgment had been affirmed on appeal. Because the affirmance of the excess judgment occurred after the filing of the bankruptcy petition, the insurance company asserted that no cause of action existed at the time of the petition and hence no cause of action passed to the bankruptcy estate. *See id.* at 299 (stating insurance company's argument that "if under Texas law no right of action accrued until after the filing of the petition in bankruptcy, the trustee has nothing"). The Fifth Circuit rejected the insurance company's argument, and held that, under the predecessor to § 541(a)(1), the cause of action for bad faith, even if contingent, became property of the estate. *Id.* ("*potential* or *contingent* claims that the bankrupt owns at the time of his petition, become[] a part of his estate, with title thereto in the trustee") (emphasis added). Thus, the argument made by St. Paul in its Petition – that a cause of action for bad faith is not property of the bankruptcy estate unless it has "accrued" under state law prior to the bankruptcy filing – is identical to that rejected by the Fifth Circuit in *Palmer*. Again, there is no conflict.

Finally, the Court should deny the Petition because even if the bad faith cause of action were not property of the bankruptcy estate pursuant to § 541(a)(1), it is certainly property of the estate under § 541(a)(7), which provides that the estate includes "[a]ny interest in property that the estate acquires after the commencement of the case."[7] Because Dr. Kimbell's liability policy clearly

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[7] Mr. Venn presented the § 541(a)(7) argument in the district court and on appeal, e.g., R. III:137 at 36, but the Florida Supreme Court and the Eleventh Circuit did not address the argument because they based their decisions on § 541(a)(1).

belonged to the estate as of the bankruptcy filing, even under St. Paul's "accrual" theory the bad faith action constituted "an interest in property" acquired by the estate "after commencement of the case." *See generally In re Wilson*, 694 F.2d 236, 238 (11th Cir. 1982) (§ 541(a)(7) brings into the estate "every . . . interest . . . not covered by a specific statutory provision mandating some other treatment").[8]

III. ST. PAUL'S ARGUMENT CONCERNING THE BANKRUPTCY QUESTION IS INCONSISTENT WITH THE POSITION ST. PAUL TOOK IN THE DISTRICT COURT

St. Paul has completely changed its legal position as to whether the bad faith action is property of Dr. Kimbell's bankruptcy estate. St. Paul now argues that the cause of action does not belong to the estate, but that is not the tune it sang before the district court. In its summary judgment memorandum, St. Paul repeatedly argued that only the bankruptcy estate could prosecute the bad faith action:

> That section [11 U.S.C. § 541] vests the bankruptcy estate with title to all legal and equitable interest of the debtor. Thus, Dr. Kimbell's bankruptcy estate is vested with whatever claim Dr.

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[8] Attempting to paint a parade of horribles, St. Paul suggests that if the decisions below are allowed to stand then debtors who suffer personal injuries after they file for bankruptcy will see any compensation for their injuries become part of the estate. Pet. 11. St. Paul's hypotheticals, however, are far removed from this case because they do not involve actions arising from liability policies issued to debtors.

> Kimbell has against St. Paul arising out of his St. Paul insurance policy.

R. II:106 at 6.

> Mr. Venn's standing as trustee of the Kimbell bankruptcy estate preempts any standing that Mrs. Camp may have to bring this action.

Id.

> Should Venn recover judgment against St. Paul in the case at bar, any monies collected would be payable to the bankruptcy estate for distribution to all of Dr. Kimbell's creditors.

Id. at 7.

> Mrs. Camp has filed a proof of claim in Dr. Kimbell's bankruptcy case and would conceivably receive a pro rata share of any distribution by Venn to creditors.

Id. at 8 n.22.

> [T]heoretically the bankruptcy estate became the owner of Dr. Kimbell's insurance policy at the time of the filing of his bankruptcy petition.

Id. at 11.[9] The district court agreed with St. Paul's arguments. *See* App. 4a ("The cause of action, if any, is Venn's alone as trustee of the bankruptcy estate.").

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[9] In support of its argument in the district court, St. Paul cited to *In re Miller*, 767 F.2d 1556, 1559 (11th Cir. 1985). *See* R. II:106 at 6 n.21. Now, before this Court, St. Paul contends that under *Miller* the bad faith action did not pass to the bankruptcy estate. *See* Pet. 9-10. Mr. Venn submits that St. Paul got it right the first time.

St. Paul's legal flip-flop is a perfect example of a party impermissibly changing its legal position on appeal, *see* 18 C. Wright, A. Miller & E. Cooper, *Federal Practice & Procedure* § 4477, at 786 (1981 & 1983 Supp.), and provides another reason for this Court to deny St. Paul's Petition. The position St. Paul took in the district court should estop it from making a completely contrary argument now. *Cf. Leonard v. Vicksburg, Shreveport, & Pacific R. Co.*, 198 U.S. 416, 423 (1905) (state court's application of "doctrine which forbids parties from assuming inconsistent positions in judicial proceedings" was an adequate and independent state ground and warranted dismissal of writ of error). At the very least, St. Paul "invited" the error of which it now complains.

CONCLUSION

For the reasons set forth above, the Petition should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED

No. 93-435

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ST. PAUL FIRE AND MARINE
INSURANCE COMPANY,
PETITIONER

v.

ANNA RUE CAMP AND JOHN E. VENN,
as Trustee of the Estate of
Fariss D. Kimbell, Jr., M.D.,
RESPONDENTS

On Petition For Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

REPLY BRIEF FOR PETITIONER

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1. Respondents argue at Br. in Opp. 4 & 5 that the Court should deny Petitioner's Petition because of the interlocutory nature of the Eleventh Circuit's order. Respondents are in error in asserting that the Eleventh Circuit's ruling is interlocutory. The Eleventh Circuit's ruling is a final order which reviewed a final judgment of the District Court granting Petitioner's Motion for Summary Judgment.

This Court generally refrains from issuing writs of certiorari to review decrees of circuit courts of appeal where the matter before the circuit court is "on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Construction Co. v. Jacksonville Railway*, 148 U.S. 372, 384 (1893). The order of the

District Court granting summary judgment to Petitioner was clearly not an interlocutory order.

Further, there are no factual matters which might be resolved at trial which would impact the questions presented by the Petition. The Petition presents questions which are pure matters of law, based upon undisputed facts. It would be inappropriate, in fact, for Petitioner to relitigate in the District Court (and presumably in the Eleventh Circuit, on appeal from any judgment of the District Court) the issues decided by the Eleventh Circuit. It would be highly unlikely that a full adjudication on the merits would alter in any way the Eleventh Circuit's ruling with respect to those issues.

Moreover, even if the opinion below were interlocutory, this Court might well decide to review the matter should it find that "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari. . . ."[1]

2. Respondents argue at Br. in Opp. 13 & 14 that the alleged bad faith cause of action, if not property of the estate under 11 U.S.C. § 541(a)(1), would be property of the estate under 11 U.S.C. § 541(a)(7). Respondents cite no authority for their position that a cause of action clearly not available to a Chapter 7 debtor on the date of the bankruptcy filing can ripen into a post bankruptcy cause of action for the benefit of a Chapter 7 bankruptcy estate.

Respondents' reliance on section 541(a)(7) is misplaced. That section simply adds to the bankruptcy estate assets which are acquired by the estate after the petition date. Section 541(a)(7) is not intended to expand a debtor's rights to a pre-bankruptcy cause of action beyond what such rights were on the petition date. As explained by the leading treatise on bankruptcy law:

> An example of the application of section 541(a)(7) would be if the trustee entered into a contract after

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[1] R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 225 (6th ed. 1986) [referencing *Estelle v. Gamble*, 429 U.S. 97, 115 (1976)].

> commencement of the case. The estate's interest in such a contract would, pursuant to section 541(a)(7), be property of the estate. (Citations omitted.)[2] (Emphasis supplied.)

Respondents correctly cite *In re Wilson*, 694 F.2d 236, 238 (11th Cir. 1982) for the proposition that section 541(a)(7) brings into the bankruptcy estate every interest not covered by a statutory provision mandating some other treatment. Br. in Opp. 14. However, the issue of whether the bad faith cause of action is property of the estate is covered by section 541(a)(1). That provision, as discussed in Petitioner's Petition[3], excludes from the bankruptcy estate claims acquired by the debtor against others unless such claims were in existence at the commencement of the case.[4] The legislative history of section 541(a)(1)[5] is clear that Congress' intention was not to expand such rights.

Under the plain holding of *Wilson*, section 541(a)(7) is inapplicable to the facts of the case at bar because, as stated in *Wilson*, there is another subsection of 11 U.S.C. § 541, i.e., section 541(a)(1), which mandates "some other treatment." Accordingly, only those rights available to Dr. Kimbell as of the date he filed bankruptcy passed to his bankruptcy estate.[6]

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[2] 4 *Collier On Bankruptcy* ¶541-20, at p. 541-105, 106 (15 ed. 1993).

[3] Pet. 9, 10.

[4] See *In re Doemling*, 116 B.R. 48 (Bkrtcy. W.D. Pa. 1990) wherein the Bankruptcy Court held that a cause of action which accrued five months after the filing date did not become property of the estate under section 541(a)(7) as it was excluded under section 541(a)(1).

[5] "Though this paragraph will include choses in action and claims by the debtor against others, it is not intended to expand the debtor's rights against others more than they exist at the commencement of the case...." H.R. Rep. No. 595, 95th Cong., 1st Sess. 376-77 (1977). S. Rep. No. 989, 95th Cong., 2d Sess. 91 (1978).

[6] *See* Pet. 8-10 and specifically n. 20 wherein the decision of *Miller v. Shallowford Community Hosp., Inc.*, 767 F.2d 1556 (11th Cir. 1985) is discussed.

Respondents clearly miss the mark by arguing that a cause of action not available to the estate under section 541(a)(1) can later become property of a Chapter 7 estate under section 541(a)(7). This result contradicts the plain meaning of section 541(a)(1), that section's legislative history and an uninterrupted line of interpretive case law.[7]

3. Respondents argue at Br. in Opp. 14, 15 & 16 that Petitioner is engaging in a "legal flip-flop" by impermissibly changing its legal position on appeal. In support of this argument, Respondents cite five quotations from Petitioner's summary judgment memorandum ("Petitioner's Memorandum").[8] Respondents have misinterpreted their meaning.

The first four quotations cited by Respondents[9] were taken from Section III A of Petitioner's Memorandum. This section of Petitioner's Memorandum addressed the issue of whether Mrs. Camp, a co-Plaintiff, had standing to prosecute a bad faith action against Petitioner. When viewed in the context in which these quotes were written, it is simply unmistakable that they carry a different meaning than that now suggested by Respondents. For instance, a plain reading of the text accompanying the first quotation shows unequivocally that Petitioner was discussing the general operation and applicability of Section 541 of the Bankruptcy Code once a bankruptcy petition has been filed. This text reads:

> Although there is Florida case law for the proposition that a malpractice victim has standing

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[7] A correct application of section 541(a)(7) would, for example, bring into the bankruptcy estate a cause of action arising from an insurance policy purchased by the bankruptcy trustee for the bankruptcy estate. See n.1, *supra*. Similarly, if the bankruptcy estate earned interest on property of the estate after the commencement of the case, such interest would become property of the estate under section 541(a)(7). See *In re Carlson*, 55 B.R. 124, 125 (Bkrtcy. W.D. Mo. 1985).

[8] R. II:106.

[9] R. II:106 6, 6, 7 and 8 n. 22.

> as a third party beneficiary to bring an excess judgment action against an insurance carrier, that case law does not involve the bankruptcy of the insured and the applicability of Section 541 of the Bankruptcy Code. That section vests the Bankruptcy Estate with title to all legal and equitable interests of the debtor. Thus, Dr. Kimbell's Bankruptcy Estate is vested with whatever claim Dr. Kimbell has against St. Paul arising out of his St. Paul insurance policy.

R. II:106 at 6.

At no time did Petitioner ever argue, or even tacitly acknowledge, that Dr. Kimbell or his bankruptcy estate possessed a bad faith action against Petitioner. Rather, Petitioner's point was that once a debtor files a petition under Chapter 7 of the Bankruptcy Code, his bankruptcy estate acquires any cause of action which he possessed at the time. The remaining quotations are similarly taken out of context.

The distortion of Petitioner's position is also readily apparent from the manner in which Respondents present the last of the aforementioned five quotations. This quotation, found at R. II:106 at 11, does not indicate the fact that it omits language at the end of the quoted sentence. The entire text of the quoted sentence reads:

> While theoretically the Bankruptcy Estate became the owner of Dr. Kimbell's insurance policy at the time of the filing of his Bankruptcy Petition, the Courts have had no difficulty in distinguishing (1) those cases where the estate had a claim or interest in an insurance policy which the Trustee <u>should</u> assert and <u>recover</u> for the benefit of a certain class of creditors from (2) those cases where the estate

clearly does not have such a claim or interest and should not assert a claim.[10]

It is of importance to note that the subsection from which the fifth quotation was taken is entitled "St. Paul owed no duty to Venn." R. II:106 at 10. This section sets forth one of Petitioner's arguments as to why Venn could not prosecute the alleged bad faith action against Petitioner. Notably, Respondents chose not to quote the conclusion of Petitioner's argument appearing at the end of this section. This omitted language reads:

> "It necessarily follows that St. Paul owed no duty to Venn or to the Bankruptcy Estate and that therefore its failure to settle Camps' lawsuit is not actionable by Venn."

R. II:106 at 14.

The foregoing demonstrates that Respondents' argument is specious. Petitioner's position is, and has always been, that no bad faith cause of action belongs to Dr. Kimbell's bankruptcy estate.

[10] It is noteworthy that Petitioner has never denied that the subject insurance policy became property of the bankruptcy estate. This proposition is settled bankruptcy law. However, it is one matter to say that the *policy* became property of the estate and quite another matter to say that a cause of action arising thereunder but *after* bankruptcy is likewise property of the estate.

* * * * *

For the foregoing reasons and those stated in Petitioner's Petition, it is respectfully submitted that the Petition for Writ of Certiorari should be granted.

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